Final Report
Ninth Circuit Task Force
on Racial, Religious & Ethnic Fairness

August 1997

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Foreword

by Chief Judge Procter Hug, Jr.

Fairness in the administration of justice is a cornerstone in our system of constitutional democracy. Identifying and eliminating sources of unfairness and bias is something to which the judges and lawyers in the Ninth Circuit have been committed since the creation of the Ninth Circuit Gender Bias Task Force in 1990. The accompanying thoughtful and scholarly report is a similarly pioneering self-examination of how the circuit measures up to its objective of being a model of unity and fairness for all those who work in and appear before its courts.

Like my predecessors, I am proud of the commitment and dedication of the scores of men and women who have devoted countless hours to seeking answers to the challenging questions posed to the task force. The circuit is especially indebted to the 18 members of the task force and staff who labored intensely for more than three years to design these studies, monitor their execution, and shepherd them to the conclusions captured in this final report and the six accompanying underlying studies which were prepared to rigorous social science research standards.

I invite every member of our Ninth Circuit community to carefully examine the insightful findings and measured recommendations set forth in the task force's report. Taken as a whole, the report is refreshingly positive. However, the task force members were unanimous in their conviction that more can and must be done to guarantee that the citizens who work in and use our courts are treated with the dignity and fairness that they have a right to expect and demand. We all aspire to a judicial system that exemplifies racial, ethnic and religious fairness. This task force was created to demonstrate our commitment to this goal and to help us achieve it. The goal is within our reach.

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Acknowledgments

The task force expresses its appreciation for the contributions and wise counsel of District Judge Harold H. Fong, who died before this work was finished.

The task force has indeed been fortunate to attract the support and energies of scores of dedicated individuals from many fields to assist it in its work. A few of them are listed below—to these and the many unnamed others who labored on its behalf, the task force expresses its sincerest thanks.

Principal Task Force Study Consultants

The task force owes special thanks to the following consultants all of whom went well beyond the call of duty in preparing the individual studies on which this final report is based. The high quality of their work was critical to the success of the task force:

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The task force acknowledges the guidance and assistance it received from a number of persons at different stages of its work:

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Each study in the appendix to the final report has been reviewed by two outside independent professional academic reviewers. The task force thanks the reviewers for their constructive criticism.

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The task force conveys its appreciation to the professional court staff who worked on this three-year project. Special thanks are due to Elizabeth Lewis who served the task force as staff, as a survey consultant, and as a report writer; to Dr. Annette Melville for her steady hand in guiding the project through its middle two years; and to Mark Mendenhall, Esq., for his stewardship in the formation of the task force and in wrapping up its work at the end.

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Other Acknowledgments

The task force thanks the many judges, attorneys and court employees who participated in the various discussion groups that were sponsored by the task force in preparation of the judge, attorney, and employee surveys.

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Part I

Executive Summary

Background, Summary of Findings, Recommendations

A. Background

1. Forming A Task Force

This report and the underlying research of the Ninth Circuit Task Force on Racial, Religious and Ethnic Fairness are part of a continuing effort by the Ninth Circuit federal courts to assure the fair administration of justice. In 1990, the Ninth Circuit Judicial Conference, the governing body of the Ninth Circuit, passed a resolution that created the Ninth Circuit Gender Bias Task Force.[1] Even before that task force had completed its pioneering work, then-Chief Judge J. Clifford Wallace convened a day-long symposium in Pasadena, California, in January 1993, to consider the effects of ethnicity, race, and religion on the business of the Circuit. The symposium report recommended more than a dozen possible areas for further study by the circuit and called upon the circuit to establish a task force to study the effect of race, ethnicity and religion on the work of the courts.[2] In August 1993, the Judicial Conference adopted Resolution No. 1: "Establish a Task Force on the Effects of Ethnicity, Race, and Religion on the Administration of Justice in the Ninth Circuit." (See Appendix, page 69.)

In the fall of 1993 and the winter of 1994, Chief Judge Wallace appointed six members to a core committee to begin to explore and define the areas of inquiry for the task force, taking the specific language of the resolution as a starting point. United States District Judge David F. Levi of Sacramento,

[1] *See* "The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force," 67 *So. Cal. L. R.*. 731 (1994).

[2] Resnik, J., "Report on the Conference: Ethnicity, Race, and Religion and the Ninth Circuit," (January 27, 1993)(available from the Office of the Circuit Executive for the Ninth Circuit).

California, was named chair of the task force in March 1994. Membership on the task force was later expanded to 18 members representing judges, lawyers, and court administrators from across the circuit.

2. Defining the Scope of the Task Force's Inquiry

Deciding which areas to study, and how to study them, undoubtedly was the task force's most important and most difficult first undertaking. To study "race, ethnicity, and religion" in the courts is quite a challenge of itself; to study it in a circuit as large, varied, and complex as the Ninth Circuit is no less than daunting. The Ninth Circuit is the largest of the federal circuits and covers the nine western states of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington as well as Guam and the Northern Mariana Islands. Different regions of the circuit have widely different demographic compositions; for example, the District of Hawaii bears little resemblance in this respect to the District of Idaho. Moreover, there is no single court administration for the circuit as a whole. The courts of the circuit include the district, bankruptcy and appellate courts, each with distinct personnel and administration. The fifteen judicial districts in the circuit have their own court administrators, Federal Defenders, United States Attorneys, and probation and pretrial services offices.

In determining which areas to study, the task force also had to be realistic so that its aspirations would not exceed its grasp. With one exception, the task force members are not professional researchers. The staff of the circuit executive is not the equivalent of a research institute, and those staff members who have assisted the task force have also had other important responsibilities. The task force has had neither a full time professional staff nor a budget of any size. It has depended throughout its tenure on voluntary donations of labor from public-spirited persons. In narrowing the focus of inquiry, the task force has had to make hard choices based upon the significance and importance of particular issues, the accessibility of reliable data, the costs involved and the time needed, the availability of experts, and a variety of other factors.

Finally, the task force has been mindful that it does not constitute a roving commission on race, ethnicity, and religion. Its charge was to study those areas of the justice system within the direct influence or control of the courts and to formulate recommendations that could be implemented by the Judicial Council or

local courts without changes in national policy or legislation.

For these reasons a number of important topics were eliminated from examination. Areas which were not studied include:

- The hiring and promotion practices of private firms and government law offices.
- The substantive content of federal law, including the fairness or unfairness of federal sentencing law such as the sentencing guidelines and statutory mandatory sentences.
- The investigation and arrest practices of law enforcement agencies, and the charging and prosecutorial decision-making policies of the United States Attorneys' offices.
- The perceptions of litigants and members of the public as to whether the litigation process is affected by bias based on race or ethnicity. Although well aware that the public's perception of the fairness of the justice system is essential to the future of that system, the task force concluded that it lacked the resources and time to undertake any direct study of public attitudes. A survey of litigants presented such logistical problems that the task force decided to rely on the attorney survey and to use a sampling plan that would maximize the chances of including lawyers in the survey who have represented minority clients. Similarly, the task force concluded that a public survey of perceptions of the federal courts would not be productive unless in depth interviews were part of the survey to establish the respondents' familiarity with the federal, as opposed to the state, courts. The project budget was insufficient to conduct such a survey.
- The effect of gender in the various areas studied by the task force. Although some of the work done for the task force addresses possible disparate treatment or perceptions related to gender, the charge to this task force was to study the effects of race, ethnicity and religion. Other bodies within the circuit already have examined possible gender bias in the courts. The Ninth Circuit task force on gender bias issued its report in 1993. In addition, the Judicial Council has appointed a Standing Committee on Gender Fairness. Accordingly, although some material relating to gender is included in the various studies prepared for the task force on racial, religious, and ethnic fairness, the task force did not study gender fairness in any systematic way and makes no recommendations on this topic.

In refining its focus, the task force was advised by academicians and members of the bar with particular expertise in the area of race, religion, and ethnicity in the court system. The task force was also guided by the work of other task forces, both federal and state. In addition, the task force relied on discussion groups of attorneys, judges and court employees to identify the questions of greatest concern. The task force sponsored nine discussion groups of attorneys who practice in the federal courts in this circuit to discuss the work of the task force and any experience of bias based upon race, religion or ethnicity that they may have had or observed in federal court. These discussion groups were held in San Francisco, Portland, Los Angeles (3), Missoula, Honolulu, Phoenix, and Seattle. Some of the discussion groups were devoted to particular topics and practice areas. For example, the Missoula discussion group convened eleven attorneys with experience in litigation on behalf of Indian tribes and Native Americans. One of the three Los Angeles discussion groups was devoted to a discussion of the treatment of minority women while another Los Angeles group consisted of lawyers who litigate on behalf of religious groups. Similarly, the task force sponsored eight discussion groups of court employees in five districts and one discussion group of judges who were representative of a variety of courts and districts throughout the circuit.

The task force organized its work into three areas—the court as employer, the litigation process, and the criminal justice system. By August 1994 each task force member had been assigned to one of three subcommittees or working groups corresponding to the three areas.(For assignments, see Appendix, p. 77.)

- Employee Worklife Subcommittee
- Litigation Process Subcommittee
- Criminal Justice Subcommittee

Based upon what the task force learned from the various discussion groups, and from the advice of consultants and other experts in the field, the task force formulated six questions that it sought to answer.

The Court As Employer

- What is the demographic composition of the population of the Ninth Circuit and of the employees in federal courthouses in the

circuit? Does the workforce of Ninth Circuit courts reflect the diversity of the populations in which they are located?

- What are the perceptions of court employees regarding the effect of race, religion, or ethnicity on various aspects of their employment by the courts, including promotions, continuing education opportunities, and grievances?

The Litigation Process[3]

- What are the perceptions of attorneys regarding the effect of race, religion or ethnicity on the litigation process in the Ninth Circuit courts?
- What are the perceptions of judges regarding the effect of race, religion or ethnicity on the litigation process in the Ninth Circuit courts?

Criminal Justice Issues

- What relationship, if any, does the race or ethnicity of criminal defendants have to pretrial detention rates in the Ninth Circuit?
- What effect, if any, does the race or ethnicity of a criminal defendant in the Ninth Circuit have on the judicial sentencing determination under the Sentencing Guidelines?

The answers to these questions required either the analysis of data that could be gathered from court records or the preparation and analysis of survey instruments.

Each of the six studies was undertaken by a consultant to the task force. The demographic study of court employees was prepared by Michael Clune, a doctoral candidate in the Demography Department at the University of California at Berkeley. The employee survey was conducted by Hoffmann Research Associates of Chapel Hill, North Carolina. The attorney survey was prepared with

[3] In addition, the task force began working with a consultant to conduct a survey of jurors about their experiences in the courts. However, in the funding crisis of the winter of 1995, the project had to be abandoned for lack of funding and time to complete it. To assist the task force, the Circuit Executive commissioned an overview of issues related to interpreter use that was completed in the spring of 1996. *See* Nakashima, M., "Language Issues in the Ninth Circuit: Equal Access to Qualified Court Interpreters" (Spring 1996) (available from the Office of the Circuit Executive for the Ninth Circuit).

the assistance of Heidi Green and was analyzed by task force member Dr. Deborah Hensler, Director, The RAND Institute for Civil Justice, and Elizabeth Lewis, former assistant Circuit Executive. The survey of judges, modeled on the attorney and employee survey, was analyzed by Ms. Lewis. The study of pretrial detention was the work of Thomas Bak, Chief of the Forecasting and Statistical Analysis Section of the Statistics Division of the Administrative Office of the United States Courts, Washington, D.C. The sentencing study was undertaken by Dr. Susan Katzenelson and Kyle Conley of the United States Sentencing Commission, Washington, D.C. All aspects of each of the six underlying studies were reviewed on several occasions by the appropriate working group and subsequently by the full task force. To assure the quality and validity of the individual studies, the task force established a policy of sending each study to two independent, outside academic experts for an evaluation as to the report's methodological soundness and readability. Specific recommendations from the reviewers have been accommodated by the authors of each of the studies.

This is the final and only written report that will be submitted by the task force.[4] The report is organized to provide an overview and highlights of the more than 500 pages of the six principal underlying studies. The individual studies are available in their entirety in separate appendices.

B. Summary of Major Findings

The Court As Employer

- The racial and ethnic distribution of court employees generally reflects the demographic make up of the particular court's resident labor force. With the exception of Native Americans, every minority group is represented in a greater percentage in the work force of the courts of the Ninth Circuit than in the available labor force.
- Both minority and white employees generally report that the courts of the

[4] Task force chair Judge David F. Levi made two oral interim reports to the Ninth Circuit Judicial Conference to keep the judges and lawyers in the circuit informed of the task force's progress. After delivery of the interim report in 1996, the Ninth Circuit Judicial Conference passed a resolution that affirmed its support for the work of the task force and urged its prompt completion and consideration on a district-by-district basis. (See Appendix, p. 73, for a copy of the resolution.)

Ninth Circuit are fair employers who do not treat employees disparately based upon their race, religion, or ethnicity.

- However, about one-third of court employees reported having heard demeaning or disparaging comments based upon gender, race or ethnicity. The two most frequent sources of such statements were reported as court staff or members of the public.
- Most judges report that in their courts, judges with different backgrounds work well together, and, in their observations, so do court staff.
- Although most judges—83% of white judges and 75% of minority judges agree that there is a sense of collegiality among the judges of their court, on the question of whether judges of the court communicate openly about non-case-specific issues or problems, only 53% of minority judges answered in the affirmative compared to 83% of white judges. However, many of the minority judges expressed no opinion in response to the question.
- Without respect to race or ethnicity, lawyers, and, to a lesser degree, judges report a lack of knowledge as to opportunities to serve on circuit and district committees.

The Litigation Process

- Very few lawyers report that they have observed any instance of judicial bias. A somewhat larger group—but still a small percentage—of lawyers report the observation of any instance of bias by other counsel.
- However, criminal defense attorneys, and assistant federal public defenders in particular, report many more instances of bias by other counsel, judges, or court staff. Reports of bias appear to vary in proportion to the overall percentage of minority clients represented by the responding lawyer, suggesting that those with greater opportunity to observe bias directed toward minority litigants are more likely to report instances of biased behavior.
- Bias based on language or accent is reported as often as bias based on race or ethnicity or perceived immigration status. Attorneys and judges agree that although proficient Spanish interpreters are available in criminal cases, qualified interpreters are sometimes not available for other languages. Interpreters are sometimes necessary in civil cases, including cases in bankruptcy court, but the courts are not authorized to pay for interpreters

when the parties are unable to afford interpreters.

- The survey included a number of questions concerning the treatment of counsel by judges, court staff and opposing counsel. Minority counsel in some of the samples are somewhat more likely than white lawyers to report that judges interrupted them more often than other counsel, that judges erroneously assumed that they were a junior member of the legal team, and that judges erroneously assumed that they were not a lawyer. However, most respondents, including minority lawyers, did not attribute perceived differential treatment to their race, ethnicity or religion. Moreover, there were no significant differences between minority and white lawyers as to their answers to other questions such as whether judges were less willing to accommodate the attorney's schedule, whether judges paid less attention to the attorney than to other counsel, and whether judges held the attorney to either a more or a less rigorous professional standard than other counsel.

Criminal Justice Issues

- The rate of pre-trial release or detention varies by racial or ethnic group. At the level of the circuit, for 1994, 65% of Hispanic defendants, 45% of black defendants, 32% of white defendants, 27% of Native American defendants and 26% of Asian defendants were detained. However, these differences in rates of detention generally are explained by legally cognizable factors such as citizenship, criminal history, nature of the crime charged, and residential status. At the district level, which is the operational level of the federal pretrial system, race or ethnicity are not statistically significant variables in explaining the decision to detain.
- The rates and reasons for detention vary substantially from district to district within the criteria established by Congress in the Bail Reform Act of 1984.
- Similarly, the study of sentencing data for 1994 and 1995 finds that although the average sentence varies by defendant race or ethnicity, from a high of 61 months for African American defendants to a low of 30 months for Asian/Pacific Islander defendants, these differences are explained by a set of legally relevant factors, most often associated with characteristics of the offense and the criminal history of the defendant. With one possible exception, relating to Hispanic drug defendants, in the violent crime,

robbery, immigration and fraud models, no significant differences in sentencing by race were found once legally relevant factors, such as criminal history, offense seriousness, and firearm enhancements, were taken into account.

The overall findings are positive. They suggest that the courts of the Ninth Circuit, whether overseeing and resolving litigation or as employers, generally are free from bias based upon race, religion, or ethnicity. The circuit can take pride in the positive findings while recognizing that there is yet need for improvement and for further reflection. This is particularly true of the survey results from criminal practitioners and of some of the results from the employee survey. The percentages of attorneys and employees who report that in the last three years they have heard demeaning remarks based upon a person's race, ethnicity or religion in a courthouse or courtroom are unacceptably and surprisingly high. Maintaining a court system that is free of bias is a continuing effort for the future. The circuit has the opportunity to build on the positive findings and to improve. The task force submits the following recommendations to that end.

C. Recommendations/Implementation

1. District Review and Implementation. In keeping with the resolution passed by the 1996 Ninth Circuit Judicial Conference, the task force recommends that each district should review the report and recommendations to determine:

(a) if educational programs for the court, staff, and local bar may be desirable at the district level,

(b) whether changes should be made to court procedures to promote fairness,

(c) whether changes should be made to court hiring, promotion, evaluation or training practices, and

(d) to report back to the task force or other appropriate committee as to any implementation efforts. Much of the data gathered by the task force either has been or can be analyzed at the district level. The task force urges each district to request and review the data gathered for that district, if a district level break down is compatible with the assurances of confidentiality that were made to survey

participants.

2. Resolution Supporting the Commitment to Equal Treatment. The task force also recommends that the Ninth Circuit Judicial Conference and each district of the Ninth Circuit adopt a resolution that reaffirms its commitment to fair and equal treatment to all members of our society.

Proposed Resolution. Litigation, inside and outside the courtroom, in any court of the Ninth Circuit of the United States, must be free from prejudice and bias in any form. Fair and equal treatment must be accorded to and by all courtroom participants, including judges, attorneys, litigants, jurors, witnesses or court personnel. Each participant in the litigation process has a duty to avoid comment or behavior that manifests prejudice or bias toward another. Prejudice or bias[5] includes, but is not limited to, demeaning or derogatory comments or behavior directed towards another on the basis of their race, ethnicity, or religion.

a. In this circuit, prejudice or bias arising from another's accent or use of a foreign language is appropriately treated as a form of racial or ethnic bias.
b. Whenever a judge observes an instance of prejudice or bias either in court or in chambers, he or she should take prompt action when appropriate, consistent with the overall circumstances.
c. Any incident of prejudice or bias, arising in the litigation process outside of the court's presence, that has not been resolved by the parties, should be promptly reported to the judicial officer.
d. Each district should appoint an advisory committee on fairness to initiate a continuing dialogue with courts of the district on issues of prejudice and bias affecting federal litigation.
e. The Ninth Circuit Judicial Council and all Ninth Circuit courts must remain vigilant in addressing issues of racial, ethnic and religious bias in the future through continuing education and regular communication with district advisory committees.

3. Further Investigation, Study or Action. Subject to the fiscal restraints of Congress, the Judicial Council of the Ninth Circuit may authorize further

[5] The task force recognizes that "prejudice or bias" has been defined by Congress and the courts. Our recommendations here are not intended to alter or affect those definitions in any manner.

investigation, study or action if significant issues of racial, ethnic or religious bias merit attention now or in the future.

a. The task force specifically recommends further discussion and study of the disparity in perceptions found in the attorney survey among federal public defenders, CJA panel attorneys, United States attorneys and civil attorneys regarding the incidence of bias in Ninth Circuit litigation. This disparity should be considered at both the district and circuit level.
b. The task force recommends appointment of a committee of pretrial services officers, magistrate judges, federal defenders, and United States Attorneys to consider the results of the detention study. In particular, the committee should give further consideration to the variations among districts concerning detention and bail, as well as certain gaps in record keeping.

4. Expand Information on Opportunities for Service. Opportunities for service to and participation in the courts of the Ninth Circuit should be available to all qualified individuals. Information regarding opportunities for service should be widely disseminated. Attorneys, judges, court personnel and others interested in service must be given ready access to information regarding the opportunities for service. Court personnel making selections should be given the opportunity to consider a broad range of personnel available for service. Additionally, district and circuit conferences should encourage participation from a broad and inclusive base of their constituencies.

a. When possible, opportunities for attorney service should be announced in state or local bar journals and posted on court bulletin boards.
b. Members of the diverse racial, ethnic and religious groups active in federal practice in the Ninth Circuit should be invited to participate on committees and other functions of the district and circuit as well as district and circuit conferences. In districts with minority bar associations, for instance, representatives of the associations could be invited to attend district conferences along with representatives of other interested groups.
c. Opportunities for attorneys and judges to participate in circuit level task forces or committees should be consolidated and publicized in an annual report prepared by the circuit executive and available throughout the circuit.

5. Increase Education on, and Discussion of, Bias Issues. Perhaps the single most important lesson that task force members have learned from their participation on the task force is that it is possible to constructively discuss sensitive questions, involving race, religion, and ethnicity, and to learn from the discussion. Opportunities for discussion and education concerning race, ethnicity and religion, as they may affect the courts, should be maintained and expanded.

a. Courts of the Ninth Circuit have introduced and should continue educational programs for court employees, attorneys and judges regarding issues of racial, ethnic, and religious bias. Future programs should also consider language, accent and culture as they effect communication in the courtroom, with specific reference to the particular cultures of each district. To the extent that issues of racial, religious, and ethnic bias may intertwine with issues of gender bias, it may be productive to combine educational programs.

b. Opportunities for education on substantive legal issues affecting the treatment of the diverse racial, ethnic, and religious groups of the Ninth Circuit should be made available to judges through the Federal Judicial Center.

c. Districts should encourage a discussion of the effects of race, religion, and ethnicity on the work of the courts at the district level whether at district conferences or at other meetings.

d. Districts should consider working with local and state judicial and bar organizations to offer joint programs on the effects of race, ethnicity, and religion on the work of the courts. Such programs might include educational meetings as well as opportunities for public participation.

6. Address Language Bias and Interpreter Access Issues. Possible bias and prejudice arising from a person's accent or use of a foreign language in judicial proceedings should be addressed by:

a. The drafting of uniform voir dire and model jury instructions for use in cases where interpreters are used or where language may be at issue;

b. The Judicial Council of the Ninth Circuit should consider developing an

improved system for identifying and sharing interpreter resources across districts.

c. Communications by individual courts, districts, the Ninth Circuit Judicial Council and individual attorneys with the Administrative Office of United States Courts regarding the expanding need for qualified court-compensated interpreters in civil cases as well as new and emerging needs for interpretation and translation services in criminal cases.

7. Continuing Oversight by an Appropriate Body.The task force recommends that some clearly identified committee be given the responsibility of continuing the Ninth Circuit's inquiry into the effect of race, religion and ethnicity on the courts of the Circuit. The task force could be continued, perhaps with new membership, or the Ninth Circuit Judicial Council's Committee on Gender Fairness might be given the responsibility for future work on race, ethnicity and religion. Either approach is acceptable to the task force.

Part II

The Court As Employer

A. Employee Demographic Profiles

Question. What is the demographic composition of the population of the Ninth Circuit and of the employees in federal courthouses in the circuit? Does the workforce of Ninth Circuit courts reflect the diversity of the populations in which they are located?

The task force took as a starting point the desirability of establishing a baseline for comparing the composition of the Judiciary's workforce with that of the surrounding population which it serves. Such information was generally obtainable. The task force did not attempt to ascertain the racial makeup of the litigants who appear before the federal courts, the racial composition of petit jury panels, or the racial composition of the federal bar—data for all of which is difficult to come by, if at all, and of uncertain reliability.

In commissioning these employee demographic studies, the task force simply sought to determine who works in the courts and how these employees compare, in the most general terms, with the labor force of the surrounding region.

Methodology. Michael Clune, a doctoral candidate in the University of California at Berkeley Demography Department, served as the consultant for this study. The analysis compares the demographic characteristics of employees working for the courts in September 1994 to the 1990 Census data, the last year for which extensive data is available by specific geographic areas within states.

Court employees at grades 6 through 13[6] are compared with working-aged citizens with at least a high school diploma or equivalent and living in areas surrounding the courthouse sites in each district. More refined comparisons are made for other subgroups of employees, including mid-level professionals at grades 11 through 13 who are compared with working-aged citizens with at least a bachelor's degree, and legal professional employees (including judges) who are compared with working-aged citizens employed as lawyers and judges. Statistical tests were conducted to determine whether differences between the employee pools and the comparative populations are significant.

Caveats. The district-by-district profiles created by the consultant are intended as static portraits. They do not purport to track changes in the employment base or to analyze management decisions such as hiring, promotions, and terminations that affect the composition of the workforce over time. For a few districts, population shifts between 1990 and 1994 may not have been adequately captured in the analysis. For these districts, the author recalculated the affected districts separately in the appendix to demonstrate the differences.[7]

Highlights. Some of the principal findings from the district studies include the following:

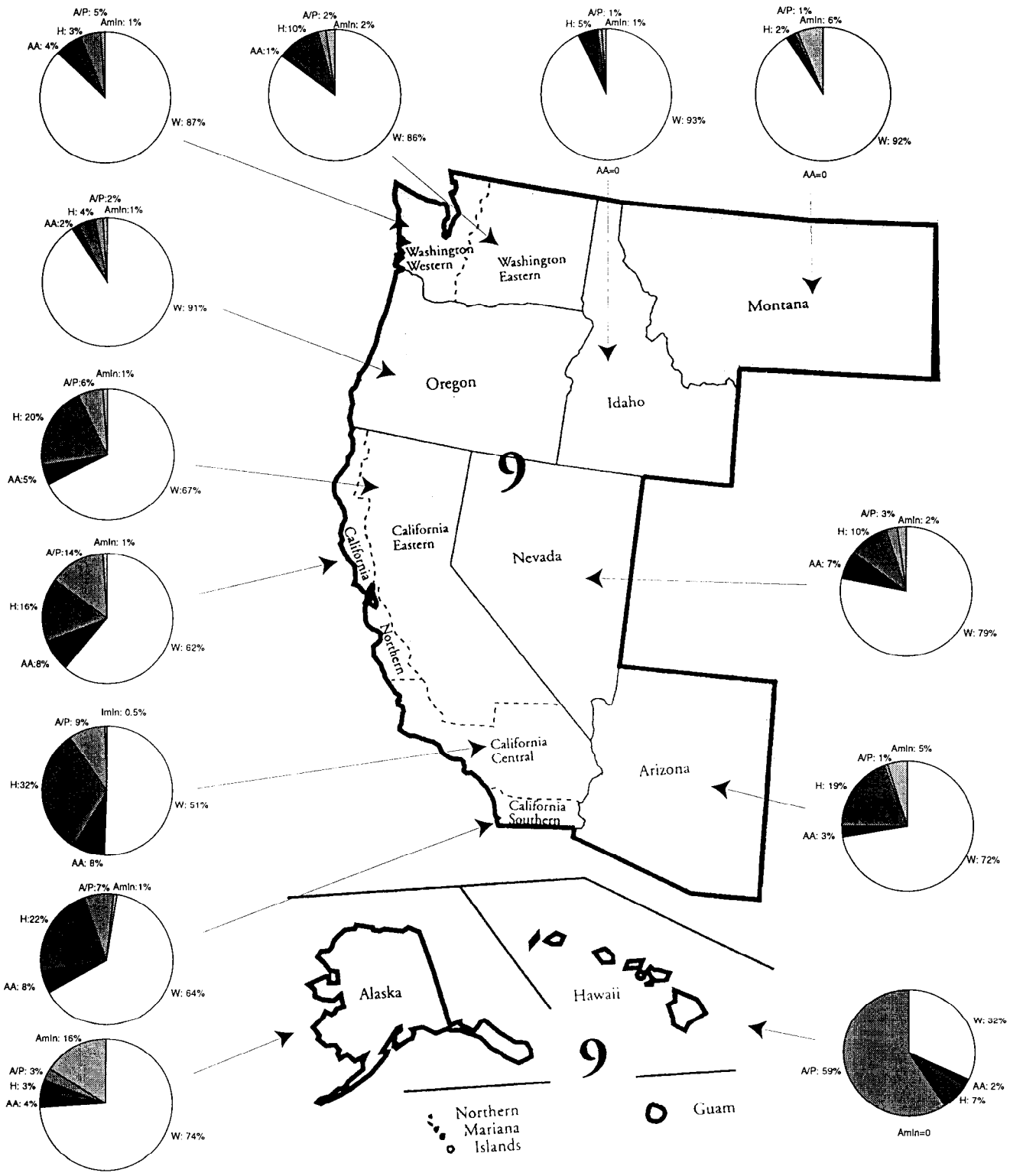
- **Ninth Circuit districts have widely varying racial and ethnic compositions.**

The 1990 district populations range from 550,000 in Alaska to 15 million in the Central District of California. Wide variation in the racial and ethnic distributions of the populations exists across districts. (See chart below.) The northern districts contain the lowest racial and ethnic diversity while the more populous southern districts contain relatively high proportions of members of racial and ethnic

[6] For most positions, the Judiciary has adopted a new personnel classification system: the Court Personnel System (CPS). Data for this report were collected while the Ninth Circuit courts were still using the Judicial Salary Plan (JSP) system. The grade levels described in this report are based upon the JSP system.

[7] Guam and the Northern Mariana Islands were excluded because comparative Census data was not available, and the court of appeals was excluded because its varied geographic work sites could not be readily handled by the regional approach of the analysis.

2.1 The Composition of the Population of Ninth Circuit Districts Varies Widely



District-by-district distribution of population by race and ethnicty for all persons residing in the district (may not total 100% due to rounding)

W=White; AA= African American; H=Hispanic; A/P=Asian/Pacific Islander; AmIn= American Indian

minority groups. The two districts in Washington had a more than 80% white population in 1990, and the populations in the districts of Oregon, Idaho, and Montana were each more than 90% white. Alaska's population, with a large Native Alaskan component, was 74% white. In contrast, the four districts of California, and the districts of Nevada and Arizona, tend to be more racially and ethnically diverse. In 1990, the populations of Nevada and Arizona were 79% and 72% white, respectively. In each of the four California districts, more than one-third of the population belongs to a minority racial or ethnic group. Only one district, Hawaii, contains a population which was less than fifty percent white in 1990; the population of Hawaii was 37% white and 59% Asian and Pacific Islander.

- **The racial and ethnic distributions of district employees reflect the diversity in district resident labor forces.**

Reflecting the resident populations of the districts in which they are located, the court employs higher proportions of white employees in the northern districts and higher proportions of African American, Hispanic, and Asian and Pacific Islander employees in the southern districts. More than 90% of the employees of the Idaho, Montana and Eastern Washington districts are white. In contrast, more than 25% of the employees of the districts of Arizona, Northern California, and Southern California belong to racial and ethnic minority groups, and more than half of the employees of the Central California and Hawaii districts are African American, Hispanic, or Asian and Pacific Islander.

- **Within districts, grade levels 6 through 10 generally contain higher proportions of employees who are members of racial and ethnic minority groups while grade levels 11 through 13 contain higher proportions of employees who are white, although the extent of grade-level variation is small in a number of districts.**

In general, the district pools of employees at grades 6 through 10, consisting largely of paraprofessionals and support staff, contain lower proportions of white employees and higher proportions of members of other racial and ethnic groups than the total employee pools. The pools of employees at grades 11 through 13, mostly mid-level professionals, and court upper management and judicial officers,

contained higher proportions of white employees and lower proportions of members of other racial and ethnic groups. For example, in the Southern District of California, 54% of grade 6 through 10 employees are white, compared to 73% of grade 11 through 13 employees and 86% of grade 14 and above employees and judicial officers. This variation across grade level was largest in Hawaii and the four California districts and generally small in the other districts. The differences in the racial and ethnic distributions of employees across grade levels are explained in large part by differences in educational attainment in the resident population. Thus, a similar pattern is observed when employees in grades 6 through 10 are compared with the population with at least a high school diploma as when employees at grade 11 through 13 are compared with the population that has at least a college degree.

- **When compared to the district resident labor forces, employees who are members of racial and ethnic minority groups are often found in higher proportions among grade 6 through 13 employees.**

Among court employees at grades 6 through 13, white employees are generally found in lower proportions than in the comparative populations. In nine of the districts, the proportion of whites among court employees was statistically significantly lower than that found in the comparative data from the Census. The districts of Alaska, Eastern California, Montana, and Eastern Washington contained no significant differences. Where white employees are found in lower proportions, members of other racial and ethnic minority groups are found in higher proportions. African Americans are found in higher proportions among court employees in Western Washington, Oregon, and Central, Northern, and Southern California. Hispanics are found in higher proportions in Idaho, Oregon, Nevada, Arizona, and Central and Southern California. Asians and Pacific Islanders are found in higher proportions in Hawaii, Idaho, and Northern and Central California.

- **Few statistically significant differences are observed between the legal professional employees and the legal professionals found in the surrounding population.**

Statistically significant differences were found in only five of the districts. In four of these districts, the proportion of white legal professionals employed by the court

was lower than in the comparison population. In the District of Hawaii, the proportion of Asians and Pacific Islanders among the legal professional employees of the court was lower than in the comparison population.

In sum, the Ninth Circuit Demography Study provides a useful snapshot comparison of the court workforce in a specific district with that of the working-aged citizen population residing in the vicinity of the courthouse. The study suggests that the workforce of the courts is broadly representative of the communities in which they are located. In nine of the thirteen districts, the study finds statistically significant under representation of white employees at certain of the grade levels. It would be inaccurate to draw further conclusions from these tests of statistical significance as they are simply a reflection of the underlying comparison that is both broad and general. For example, no study has been made of job applications at the district level. It may well be that the demographic make-up of the employee population in these districts is consistent with the make-up of the qualified applicants seeking employment in the federal court. The results are reported solely for the purpose of indicating areas where closer examination may be appropriate. In light of the findings, individual districts should consider whether their hiring practices are such as to encourage racially and ethnically neutral hiring.

B. Survey of Employees

Question. What are the perceptions of court employees regarding the effect of race, religion, or ethnicity on various aspects of their employment by the courts, including promotions, continuing education opportunities, and grievances?

The Ninth Circuit Judicial Conference resolution that created the task force directed it to consider the courts as employers. The courts of the circuit employ some 4,600 persons. To determine whether the courts' employees perceive their own court as treating employees fairly, without bias based upon an employee's race, religion or ethnicity, the task force commissioned a survey of all federal court employees in the circuit to measure the extent to which employees may have perceived or experienced unequal or unfair treatment during their employment.

The task force determined to conduct a survey of *all* court employees for

several reasons. First, the Ninth Circuit Gender Bias Task Force had not neither the time or resources to undertake such a survey. Second, the task force felt that the importance of the issue of racial, ethnic or religious bias is such that all court employees should have an opportunity to participate in the study. Third, the size and diversity of the circuit are so considerable that anything less than a survey of *all* court employees would be viewed as suspect. Fourth, by including all employees, further analysis at the district level becomes possible. Finally, the courts' employees work in a variety of offices that often are not closely connected to one another or that have different management structures. For instance, the survey includes units such as probation offices, federal defenders' offices, as well as clerks' office personnel and judicial staff.

Methodology. Dr. Carl C. Hoffmann and Kathleen Hoffmann of Hoffmann Research Associates of Chapel Hill, N.C., were the principal consultants for this study.

The consultants worked closely with the Employee Worklife Subcommittee to develop the issues and procedures for administering the mailed survey. The consultants conducted eight employee focus groups in five districts to ascertain the most important issues to include in the survey questionnaire.A copy of the survey is attached to the Hoffmanns' report in Appendix B. The survey asked questions organized under the following topic headings:

1. Current employment
2. Prior experience
3. Demographics
4. Initial hiring
5. Professional development
6. Time demands
7. Performance evaluations
8. Job changes
9. Language skills
10. Work aspirations
11. Work climate and co-worker conduct
12. Problems at work
13. Perceptions of fairness in the workplace

In May of 1996 the survey instrument was pre-tested in the District of Idaho. After minor modifications, it was mailed to all court units by the Office of the Circuit Executive so that it was available to most employees on June 28, 1996. In the largest survey ever conducted of Ninth Circuit employees, the survey was mailed to 4,606 active employees who were working for the courts between June 18 and July 8, 1996. The survey included a cover letter from Chief Judge Hug, a

letter from the consultants guaranteeing confidentiality, and a pre-addressed, postage-paid envelope to return the surveys directly to the consultants. With no subsequent follow up mailing, due to a lack of funds, the survey attained a 66% response rate from across the circuit.

The data have been analyzed at the circuit level for two reasons: first, it was too expensive for the task force to commission separate analyses of the individual districts and the court of appeals, and second, the task force had some concern that a district-level analysis could compromise the respondents' confidentiality in the smaller districts.

Caveats. A survey of employees' perceptions of their treatment and that of others of necessity calls for subjective responses and characterizations of events. Employees come to the courts with attitudes shaped by the society and with different levels of education and training which, in turn, will affect their current and future job assignments. Employees who are members of racial or ethnic minority groups legitimately may be unable to distinguish what they perceive as an unfair decision from a decision arising from racial bias. Moreover, employees who are members of racial or ethnic minority groups are faced with the mathematics of being a minority, even if (as the demographic studies seem to show) they are proportionately represented at all levels of the organization. Thus, for example, in the competition for promotions, members of the majority group will receive more promotions in absolute numbers than members of minority groups simply because there are fewer minority candidates. Yet this situation could give rise to a perception of unfair treatment.

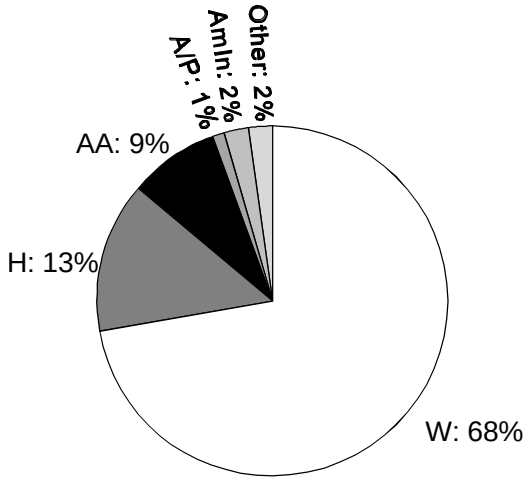
In short, there is an important difference between the perception of bias and an objective finding of bias. A perception of bias is one person's interpretation of a situation or the motivations of some other person. The perception may be flawed. It may be based on unwarranted assumptions, on insufficient data or inaccurate information. Nonetheless, perceptions—whether accurate or not—are important in the operations of a courthouse. The line between perception and objective evidence can be murky, but the task force has attempted throughout this report to avoid confusing the two at the same time acknowledging the importance of perceptions as a distinct kind of fact in and of itself. This caveat is appropriate to all of the studies in this report that rely on survey data.

A second caveat is appropriate for all studies in this report that present aggregated data for the entire circuit rather than district by district. Several of the districts, such as the four California districts, and the District of Arizona, have many more employees and process many more cases than other districts in the circuit such that generalizations at the circuit level well may not apply to all districts or to employees of the court of appeals.

Highlights. Some of the principal findings from the employee surveys include the following.

Profile of Respondents

2.2 Distribution by Race and Ethnicty of Respondents to Survey of Employees



*** Because some people report having multiple ethnicities, the numbers add up to more than100% (total#=3092).**

W=White; AA= African American; H=Hispanic; A/P=Asian/Pacific Islander; AmIn= American Indian

- Fully two-thirds of the courts' employees responded to the survey. Members of racial or ethnic minority groups comprise 32% of the respondents (See chart 2.2 above.), and women 70%. The courts' employees are mature, with a median age of 39, career-oriented, with time in their position averaging six years, and well-educated, with 64% having attended four or more years of college.
- Comparing response rates to the figures from the relevant demographic

studies prepared for the task force, women and members of racial or ethnic minority groups in all but a few districts responded to the survey in higher percentages than were generally present in the court in 1994, indicating a high degree of interest in the study among these groups. Hispanics made up 12.5% of respondents; African Americans, 8.5%; Asians, 8.2%; Native Americans, 2.1%; and Pacific Islanders, 1.2%.

Initial Hiring Experience

- The vast majority of employees of all races were hired for the job they initially sought. This indicates that the courts do not steer or guide employees, on the basis of racial stereotypes, away from the jobs employees initially sought.

- Employees who are members of racial or ethnic minority groups report that they learned of job openings through "word-of-mouth" more often than white employees (41% v. 28%).

Professional Development

- In the area of professional development, all groups of employees appeared equally active in requesting some type of training. Equal percentages of men and women reported being invited by a supervisor/manager to participate in any type of professional development/training, but a higher percentage of white employees (67%) than employees who are members of racial or ethnic minority groups (60%), reported being invited.

- Equal percentages of white employees and employees who are members of racial or ethnic minority groups report having been given temporary assignments or projects that provide an opportunity to learn or demonstrate additional skills.

Leave & Time Flexibility

- More than one quarter (26%) of the women respondents reported their office allowed job sharing, compared to 22% of the men, and almost everyone who requested job sharing was permitted to do so.
- Approximately the same percentages of minority and white employees report that their sick leave and annual leave requests are granted.

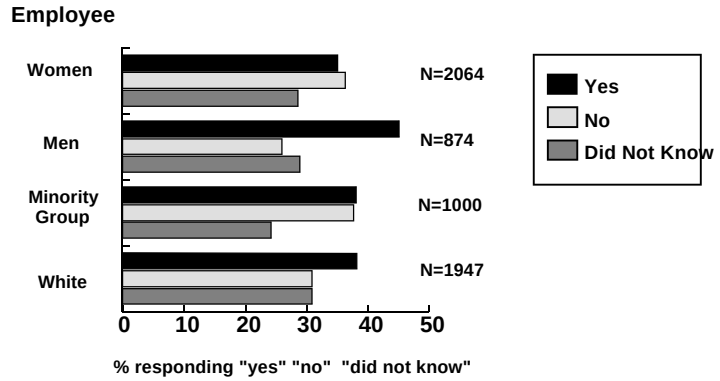
- While only a small number of respondents indicated that they had asked to work on an official holiday in return for time off to observe a religious holy day of personal importance, their requests were distributed across all religions and the majority of such requests were granted.

Performance Evaluations

- The general employee population expressed trust in the evaluation process as applied to themselves. A greater proportion of employees who are members of racial or ethnic minority groups (74% to 64% for white employees) reported that they received performance evaluations within the last three years. Only a small proportion of white and minority group employees report that their last employment evaluations were mostly not, or not at all objective, with a greater percentage of minority employees than white employees (11% to 6%) so reporting. Roughly equal proportions of men and women (8%) reported that their evaluations were mostly not, or not at all objective.

- Employees seem to perceive a distinction between the established procedures for conducting performance evaluations and the implementation of those procedures. Regarding implementation, when asked whether they felt that those responsible for rating employees' job performances did so fairly and consistently for all of the staff, approximately 38% of employees who are members of racial or ethnic minority groups and 31% of white employees responded "no," and 26% of men and 36% of women responded "no." (See chart 2.3 below.) Approximately the same percentage of minority group and white employees responded that those who rate employees' job performance did so fairly and consistently for all of the staff. (Other employees answered that they did not know.)

2.3 Do Those Responsible for Rating Employee Job Performance Do So Fairly and Consistently for All Sta



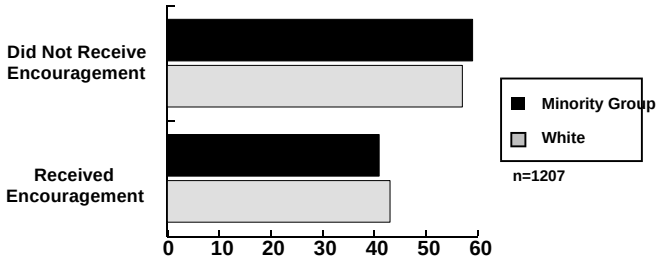
- Those who answered that performance ratings were not fair or consistent for all staff tended not to attribute such unfairness to the race of the employee or supervisor but rather to factors such as personality, friendships, a supervisor's desire to avoid conflict, and a lack of managerial training.

Job Changes/Hiring

- More white employees than employees who are members of racial or ethnic minority groups (50% to 37%) and more men than women (55% to 41%) felt that all employees in their court had a fair to extremely fair opportunity to be considered for an opening based upon job-related skills and experience. However, nearly equal percentages of respondents in all groups (37-39%) reported that they were likely or very likely to reach their career goals within the court.

- Almost two-thirds of respondents who applied for a new position but did not get the position believe that there were reasons other than what they were told that would explain why they were not offered the position. The fifth most frequently reported unstated reason was race or ethnicity, with 37% of employees who are members of racial or ethnic minority groups (42 responses) believing race or ethnicity played a role, compared with 6% of white employees.

2.4 Proportions of Minority Group and White Employees Who Report Being Encouraged by Management To Apply For Promotions



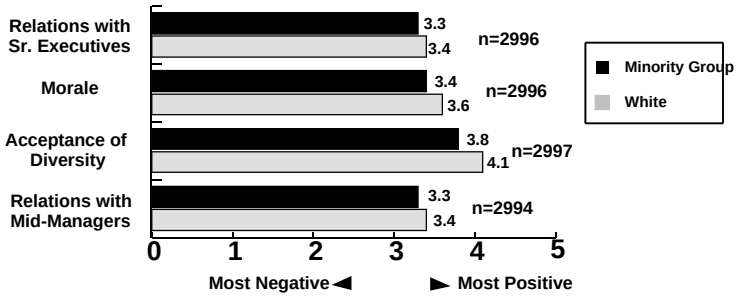
- Roughly equal proportions of all employees, irrespective of race, ethnicity, or gender, stated that they were encouraged by their supervisor or manager to apply for a promotion. (See chart 2.4 above.)

Work Climate

- About one-third of court employees reported having heard demeaning or disparaging comments based upon gender or race/ethnicity, and about one-fifth had heard such comments based upon religion. The most frequent sources of such statements were reported as members of the public (18%), court staff (15%), or court security officers (11%).

- Several of the questions were designed to test how well the courts were perceived to accept individuals with diverse backgrounds. The answers permitted a range of responses from 1 (least favorable) to 5 (most favorable). “Acceptance of diversity” received the highest positive rating from all court employees, without respect to race, ethnicity, or gender. (See chart 2.5 below.)

2.5 Rating the Work Climate in Four Areas, Both Minority Group and White Employees Give the Highest Rating to the Acceptance of Diversit



Problems in the Workplace

- More women (30%) than men (21%) reported that they had experienced a serious problem at the workplace. Roughly equal percentages of minority employees and white employees reported having experienced such a problem. About one-fifth of employees reported that they were usually able to resolve the problem informally with a good or excellent result; however, higher proportions of employees who are members of racial or ethnic minority groups (19% vs. 11% for white employees) reported filing a formal complaint. In addition, of the small number who filed formal complaints, few felt that their grievance received objective or absolutely objective consideration—only 10% of minority group employees, compared to 28% of white employees, reported feeling that their complaints were objectively considered.

- The clear majority of all employees believe that their race, ethnicity, gender and religion has not affected their treatment by managers or judges. However, higher percentages of women (13% to 6% for men) and employees who are members of racial or ethnic minority groups (16% to 2% for white employees) reported negative treatment. Moreover, a further breakdowns of responses indicated that almost 31% of African American employees reported negative treatment as compared to white employees (2%).

- Most respondents felt that their religious affiliation had no effect on their treatment by supervisor or other managers. Of those who reported an effect, most reported that their religious affiliation had led to more positive treatment.

- With respect to the management level of those identified as responsible for perceived biased treatment, supervisors and managers were identified as those most responsible, followed by senior executives and judges. Thirty percent of women who perceived that they were treated negatively based on their gender, race or ethnicity cited judges as the source of bias. This percentage is considerably higher than the comparable responses from men (19%), employees who are members of racial or ethnic minority groups (16%) and white employees (11%).

The Survey of Employees may assist court administrators and managers to identify those aspects of court personnel operations most cited by employees as deficient. The task force lacked the necessary funding to request an analysis of the data on a district-by-district basis. However, the consultants may be able to conduct further analysis for particular districts upon request if the analysis would not compromise confidentiality. Although the findings are mostly favorable, the survey suggests that there may be problems in management style which merit examination. Specific areas of concern appear to include performance evaluations and the formal mechanisms for handling employee grievances.

Because so many employees participated in the survey and expressed interest in its results, the task force urges court managers to discuss the survey results with employees in their units.

C. Survey of Judges

All 307 judicial officers within the circuit were surveyed by the task force. Of these, 241 returned surveys, for an overall response rate of just under 79%. The results of the survey are presented in a separate report included at Appendix D. Because judges are colleagues and managers, like other court staff, and because judges also are observers of the litigation process, like the attorneys that appear before them, the Survey of Judges is a hybrid of the kinds of questions asked in the

Survey of Employees and the Survey of Attorneys. In addition, the task force sponsored a discussion group of judges to identify further areas appropriate for inquiry. Those portions of the Survey of Judges that addressed judges as co-workers and colleagues are discussed here; those portions of the survey that addressed the litigation process are discussed in the following section.

Demographics of the Survey Population

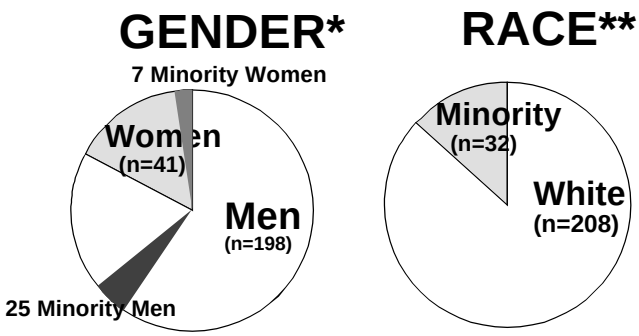
2.6 Survey Response Rates by Type of Judge

Type of Appointment	Overall Response Rate	Percent of all Surveys by Typ: Number Mailed	% of Total	Number Received	% of Total
Senior Circuit Judge	71.4%	14	4.6%	10	4.1%
Active Circuit Judge	73.9%	23	7.5%	17	7.1%
Senior District Judge	64.4%	45	15.6%	29	12.0%
Active District Judge	75.9%	87	28.3%	66	27.4%
Bankruptcy Judge	91.3%	69	22.5%	63	26.1%
Magistrate Judge	84.8%	66	21.5%	56	23.3%
Total		307	100.0%	241	100.0%
Missing data				2	

Although the judges of the courts of the circuit are predominantly white, the percentage of judges who are members of racial and ethnic minority groups, 13%, is larger than the percentage of lawyers who are members of racial and ethnic minority groups who responded to the attorney survey even though the survey was designed to increase the likelihood of participants who were from racial and ethnic minority groups.[8] (See chart 2.6 above and 2.7 on the next page.)

[8] The task force does not have a breakdown by race of the attorneys who practice in federal court. These statistics do not exist. For comparative purposes, the attorney samples may be used with the caveat that some of the samples were constructed with the purpose of increasing participation in the survey by attorneys from racial or ethnic minority groups and increasing the participation by attorneys whose clients were members of racial or ethnic minority groups. The general civil sample is by far the largest sample. Of those lawyers having a general civil practice, 9% identify themselves as belonging to a racial or ethnic minority group.

2.7 Distribution of Responding Judges by Race and Gender



* gender: 4 missing data
** race: 3 missing data

Judges' Experiences/Observations of the Workplace

- Almost all judges agreed that there is a sense of collegiality among the judges of their court. Among white judges, 83% agreed with the statement; among judges who are members of a racial or ethnic minority group, 75% agreed.

- A clear majority of all judges agreed with the statement that judges of different backgrounds and traditions work well together. White judges and male judges agreed at the 88% and 89% level, while minority judges and female judges agreed at the 78% and 76% levels with this statement. Court of Appeals judges had the highest level of agreement at 92%.

- A notable difference arose between judges who are members of a racial or ethnic minority group and white judges on the question of whether judges of the court communicate openly about non-case-specific issues or problems. Only 53% of minority judges agreed with the statement as compared to 83% of white judges. However, many of the judges who are members of a racial or ethnic minority group expressed no opinion in response to the question.

- Almost 25% of all responding judges do not think that judges are given adequate opportunities to participate in circuit-level task forces or committees.

- Only 60% of women judges agree that there are adequate opportunities to participate in decision-making within the court. This compares to agreement rates of 73% to 77% for male judges, white judges, or judges who are members of a racial or ethnic minority group.

- The majority of judges are supportive of the work of the task force. Almost all judges voted in favor of the 1996 resolution supporting the work of the task force. However, judges are almost evenly divided as to the value of educational programs addressing race, religion, and ethnicity in the courts. Judges who are members of a racial or ethnic minority group and women judges are more favorable, as are bankruptcy and magistrate judges.

2.8 Degree of Support for Continuing E Addressing Race, Religion & Ethni

	Yes		No		
	Number	%	Number	%	Total
By RACE/ETHNICITY:					
Minority Group	19	59.4%	13	40.6%	32
White	97	47.3%	108	52.7%	205
Total	116	48.9%	121	51.1%	237
By GENDER:					
Men	88	45.1%	107	54.9%	195
Women	28	68.3%	13	31.7%	41
Total	116	49.2%	120	50.8%	236
By TYPE OF APPOINTMENT:					
Circuit Judges	10	37.0%	17	63.0%	27
District Judges	41	44.1%	52	55.9%	93
Bankruptcy Judges	34	54.0%	29	46.0%	63
Magistrate Judges	31	56.4%	24	43.6%	55
Total	116	48.7%	122	51.3%	236

Part III

The Litigation Process

Surveys of Attorneys and Judges

Questions. What are the perceptions of attorneys and judges regarding the effect of race, religion or ethnicity on the litigation process in the Ninth Circuit courts?

Methodology. Much of the work of the task force and its Litigation Process Subcommittee dealt with determining whether demeaning or disparaging speech or behavior occurs during the litigation process. Lawyers and judges, as participants in federal litigation, were asked whether they had personally observed or experienced such behavior during their interactions in federal court in the Ninth Circuit. Two surveys were designed to address these questions: a survey of all Ninth Circuit judges (the Survey of Judges) and a survey of approximately 10,500 attorneys (the Survey of Attorneys) representing various civil and criminal practice areas. The Survey of Judges methodology has been described briefly above (at p. 29).

The Survey of Attorneys was designed after consultation with discussion groups of lawyers in several districts. During the spring of 1995, nine discussion groups were organized in seven cities across the circuit, all moderated by local attorneys. To ensure the confidentiality of the participants, no task force members or Ninth Circuit staff attended the meetings; proceedings were transcribed but individual speakers were not identified by name. These meetings addressed the experiences of minority practitioners and litigants in general. Some of the discussion groups focused on particular topics such as the experiences of Native American litigants, minority women lawyers, non-English speaking members of racial and ethnic minority groups, criminal practitioners, and lawyers who litigate cases involving religion.

The sampling plan for the Survey of Attorneys was developed with the assistance of court management consultant Heidi Green, under the guidance of task force member Dr. Deborah Hensler, Director of the RAND Institute for Civil Justice. Ms. Green also assisted in developing the survey instrument. The sampling design had three objectives:

(1) to survey enough attorneys to ensure that the number of responses from each district would yield statistically meaningful results;

(2) to maximize the likelihood that a reasonable number of respondents would be from racial and ethnic minority groups; and

(3) to ensure that individuals contacted would have had some recent experience in federal court. Eight subsamples were identified representing a variety of practice areas.

Caveats. Discussion group participants frequently noted that overtly disparaging speech or behavior is rare in most aspects of the litigation process, perhaps being replaced by bias that is less overt. However, the perception of subtle forms of bias may be highly individual, and there may be little agreement among various observers as to whether a particular situation involves bias or even unfair or unusual treatment. Moreover, surveys are limited in their ability to measure subtle perceptual nuances. For these reasons the task force wanted the survey to be as objective as possible, and respondents were asked to report on what they had directly heard or seen of an overtly biased nature.

Even with the effort to make the survey as objective as possible, the answers to the questions are necessarily based on respondents' perceptions, and these perceptions may not be accurate or may be based on respondents' differing perspectives and philosophies. For example, a defense attorney in a criminal case may consider a judge's comment about a defendant's immigration status to be "demeaning," and answer the survey accordingly, while others observing the same event might consider the statement germane and appropriate.

The numbers within many individual subsamples of the Survey of Attorneys are quite small and do not constitute a random sample of all federal practitioners. Generally, response rates tend to be higher from groups or individuals who have an interest in the results (i.e., respondents tend to "self-select" according to the

degree of personal interest they may have in the subject of the survey). The results and findings below should be treated with caution when attempting to generalize from the subsamples to all attorneys practicing before the Ninth Circuit courts. This caution is particularly applicable to the discussion of responses from attorneys in public defender offices. Similarly, since many of the responding attorneys practice in the most populous districts, generalizations based upon their perceptions may not apply to all of the districts in the circuit.

Finally, the survey did not address several areas often cited when unfair treatment is reported. Because the task force's mission was to gather information about issues that could productively be addressed by the courts, the surveys did not ask questions, for example, about racial, ethnic or religious bias within private law firms. Discussion groups also suggested that non-attorney participants (litigants, witnesses, jurors and others) might experience racial, ethnic or religious bias (or be responsible for it) more than legal practitioners or judges. Time and resource constraints made it impossible to survey or contact members of these groups or to otherwise test the validity of the observations expressed by some attorneys in these discussion groups. Perhaps this is an area for further study.

Highlights. Key findings from the responses to the Survey of Judges and the Survey of Attorneys are summarized below. The analysis primarily compared responses of attorneys in the general civil sample as representative of the typical federal practitioner with responses of United States Attorneys, Federal Public Defenders and Criminal Justice Act panel lawyers. These three groups tend to have substantial and regular exposure to federal criminal litigation. Results for all samples are shown in the appendices to the report which is found at Appendix C.

1. Demographic Composition of Survey Respondents

- **The attorney response rates by subsample varied between 40% and 62%, with an overall response rate of slightly less than 47%.**

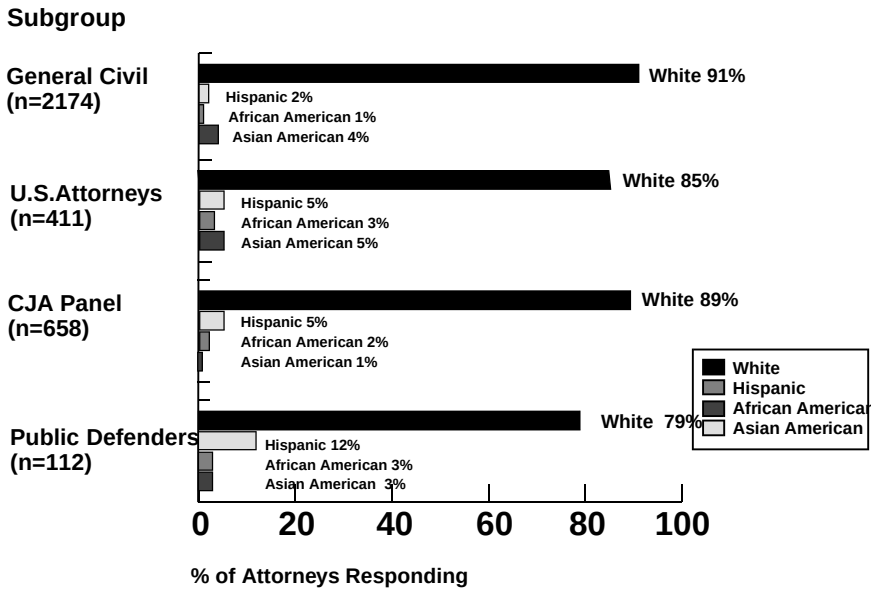
3.1 Responses to Survey of Attorney By Type of Practice

Sample	Mailed	Returned	Response Rate
General Civil Practice	5,013	2,181	43.5%
Labor	540	282	52.2%
Civil Rights	713	364	51.1%
Bankruptcy	1,000	403	40.3%
United States Attorneys	780	414	53.1%
Criminal Justice Act Panel Attorneys	1,325	662	50.0%
Federal Public Defenders*	183	113	
Appellate	972	483	61.7%
Missing Sample Code		3	49.7%
	10,526	4,905	46.6%

*** Includes Community Defender Organizations**

- **Most lawyers who responded are white and non-Hispanic.** Some other subsamples (particularly Federal Public Defenders) show a higher representation of lawyers who are members of racial and ethnic minority groups. (See chart 3.2 below.)

3.2 Most Attorneys Who Responded to the Survey are White and Non-Hispanic

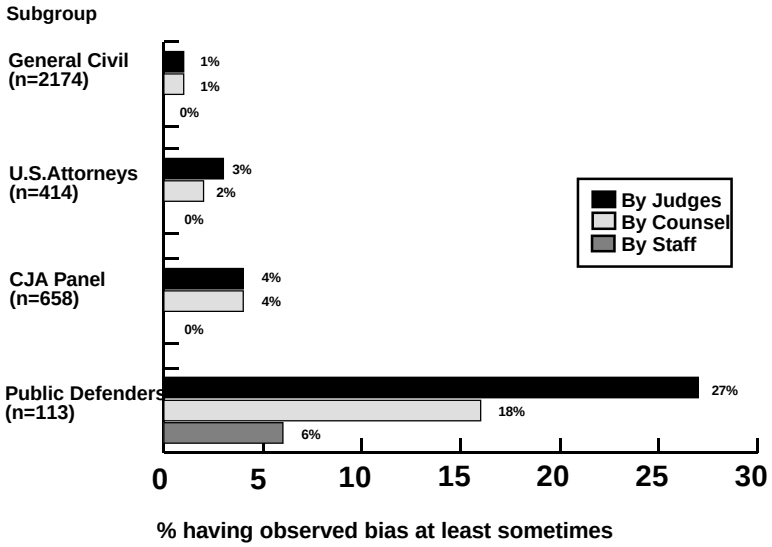


2. Assessments of Bias

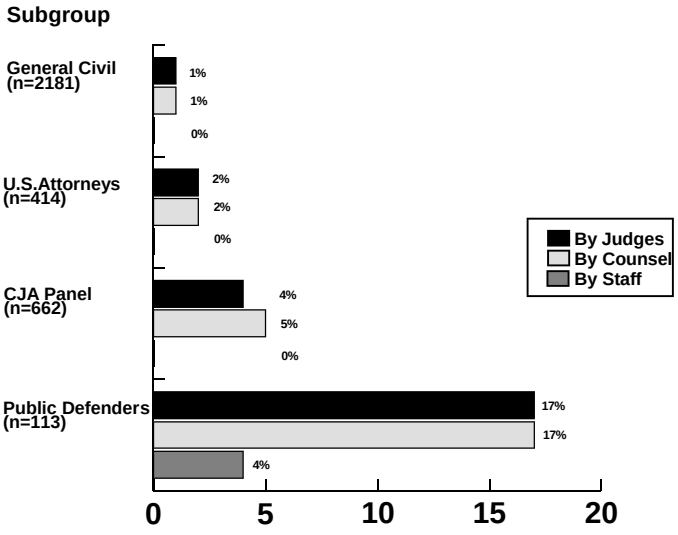
- **Very few general civil sample lawyers report instances of bias in COURTROOM INTERACTIONS.** Criminal practitioners tend to report more instances than do other samples although the percentage is still small. (See chart 3.3 below.)

- **A similarly small minority report observing instances of bias in INFORMAL PROCEEDINGS in chambers.** Again, Federal Defenders tend to observe counsel bias more frequently than do others. (See chart 3.4 below.)

3.3 Few Attorneys Report Having Observed Instances of Bias IN THE COURTROOM

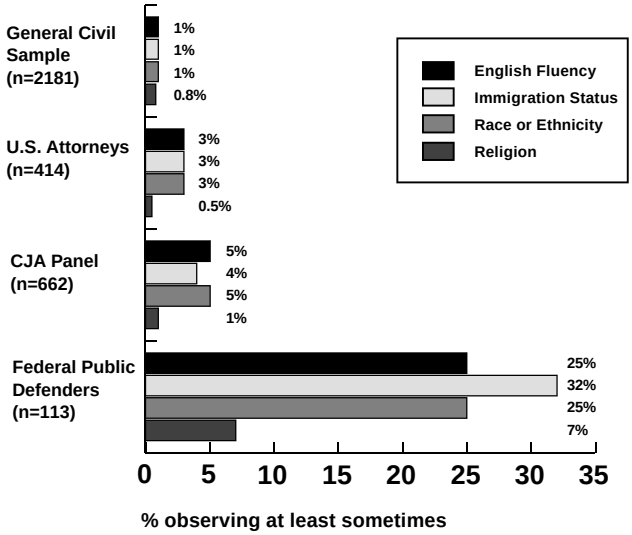


3.4 Few Attorneys Report Having Observed Instances of Bias In INFORMAL PROCEEDIN

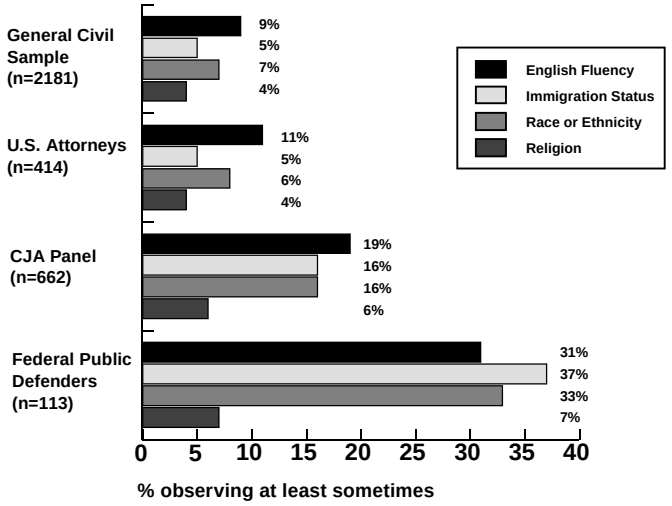


- **Parties in litigation proceedings are more often the target of demeaning remarks than are attorneys themselves.** Federal Public Defenders, United States Attorneys, and Criminal Justice Act panel attorneys are more likely to report at least sometimes observing bias directed at parties by judges (chart 3.5), by other counsel (chart 3.6) and by court staff (chart 3.7). Federal Public Defenders report observing bias toward parties more often than do other criminal lawyers.

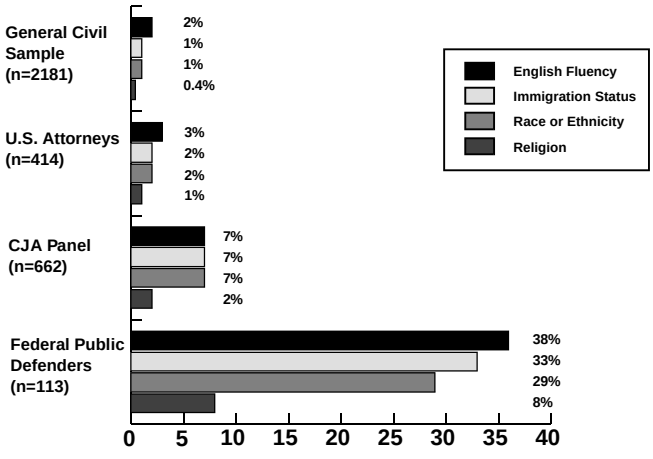
3.5 Observations of Judicial Bias
Judges At Least Sometimes Demeaning Parties



3.6 Observations of Bias by Counsel
Counsel at Least Sometimes Demeaning Parties



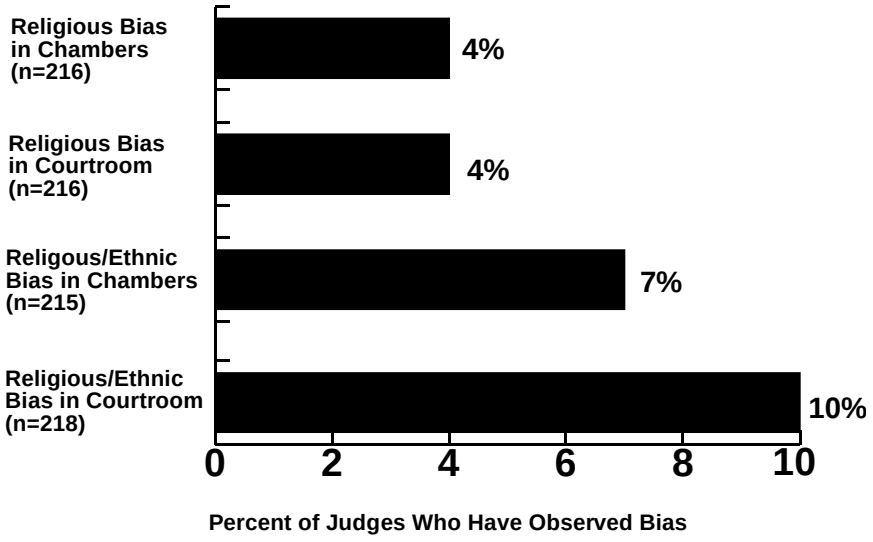
3.7 Observation of Bias by Court Staff
Court Staff at Least Sometimes Demeaning Parties



- **According to attorney respondents, the incidence of bias increases when interactions are "off the record" and outside the presence of a judge.** At least 6% of every attorney sample reports bias by other counsel outside of the courtroom or chambers. For example, reports range from 6% of United States Attorneys, 8% of general civil lawyers, and 35% of Federal Public Defenders.

- **Less than 10% of the judges responding to the survey report observing racial or ethnic bias in the courtroom or in chambers.** Judges observe more inappropriate behavior in the courtroom than in chambers. Fewer judges have observed examples of religious bias than racial or ethnic bias.

3.8 Judges' Observations of Religious Bias



3. Responding to Bias

- **The majority of lawyers feel that judges should always immediately deal with demeaning or disparaging treatment of litigation participants when it occurs in the courtroom. Most judges agree that lawyers should always report bias that could affect a case to the judge.**

Fifty-six percent of general civil practitioners and United States Attorneys believe that judges should always intervene, and 60% of CJA attorneys do. Federal Defenders, who most consistently report observing bias, also most consistently believe that judges should always intervene. However, between 23% and 30% of these four samples preferred that judges intervene "sometimes" rather than "always." When judges were asked how often they had intervened when apparent bias occurred in the courtroom, all report intervening at least occasionally but only one reports intervening frequently.

4. Personal Experiences of Attorneys

- **The number of attorneys reporting that they have experienced biased treatment during litigation in the Ninth Circuit courts is generally small, particularly for civil practitioners**.

As with observations of treatment of others, criminal practitioners are more likely to report that they have experienced unfair treatment than do other lawyers. Lawyers who report being treated differently than other counsel by opposing lawyers, judges or court staff do not generally attribute that treatment to their own race, ethnicity or religion, and the number who answered these questions is fewer than 300 out of a survey population of almost 5,000 respondents. However, some patterns are evident which may present opportunities for further study and discussion, both at the circuit level and within individual districts.

- **Lawyers who are members of racial and ethnic minority groups and female lawyers report a greater incidence of being interrupted by other lawyers (especially in bankruptcy court), or being erroneously identified by judges and court staff as a junior attorney, or not being recognized as an attorney at all.**

- **Significant differences for many samples are more often found when the responses of men and women are compared than when the responses of lawyers who are members of racial and ethnic minority groups and non-minorities are compared.** A number of marginal comments suggest that gender concerns may outweigh concerns with racial or ethnic bias for many respondents. However, this question could not be explored in depth because breakdowns by race and gender yielded very small numbers.

5. Accommodation of Religious Differences

- **Religion is least often cited as the subject of bias, perhaps because it is less obvious than other demographic characteristics.**

Between 10% and 23% of lawyers (depending on the sample) have observed cases in which the religious affiliation of litigation participants was apparent through distinctive appearance or behavior, but only 119 respondents report actually representing a client on a religious issue during the three years preceding the survey. Because so few attorneys reported experience with religious issues in the litigation context, the survey results are inconclusive. From earlier discussion groups, however, the task force learned that some lawyers believe that litigation in the federal courts presents some particular concerns for religious groups and litigants. The courts may wish to explore these concerns more fully in subsequent meetings at the district level.

- **Asked about the effect of judges' treatment of parties whose religious affiliation was apparent or who requested accommodation related to religious requirements, very few lawyers who have experienced such situations report that judges' treatment of parties had unambiguously negative effects**.

A few lawyers reported that they had been involved in cases where the religion of the parties was evident or was key to the case. Of these, some reported that judicial treatment of parties due to religious affiliation had negative effects, with the highest proportions coming from the public defender (19%), civil rights (13%), and CJA panel (10%) samples. No other sample had more than 8% responding this

way.

Most lawyers reported that religious affiliation had either mixed effects (between 15% and 31%) or no effect (between 42% and 76%) depending upon the sample. However, marginal comments on some attorney surveys indicate that those who do perceive religious bias on the part of other counsel, judges or court staff feel strongly about it.

- **Attorney survey data shows that during the past three years less than 10% of respondents had asked to reschedule a matter because of a religious conflict. Roughly three-quarters of those who had made such a request stated that their requests were usually handled seriously by the court.**

Responses to the Survey of Judges show that most judges believe that legitimate religious conflicts merit consideration, with almost 90% of judges reporting that they try to accommodate such requests when they arise.

6. Access to Court Interpreters

The use of interpreters in the Ninth Circuit has been growing rapidly. Between 1990 and 1995, court interpreter use in the Ninth Circuit increased by 50% (overwhelmingly in criminal cases) while the number of criminal filings remained relatively stable. In the attorney discussion groups, some attorneys suggested that there is an emerging need for court-appointed interpreters to serve civil litigants. This may be particularly true in the bankruptcy courts where many litigants appear *pro se*. Under current law, civil litigants are not entitled to a court appointed interpreter.

The surveys asked judges and lawyers about three major issues:

(1) the frequency with which they have perceived a need for interpreters in both criminal and civil cases;

(2) the adequacy of interpreters' services that are presently being provided in their courts; and

(3) whether judges and attorneys think that the use of interpreters in itself results in negative reactions to defendants by some case participants.

- **Almost half (47%) of attorney respondents with criminal practice experience report that at least some of their clients are unable to participate effectively in their defense without English language assistance, and slightly over one quarter (26%) of those with civil practice experience report similarly.**

More than one quarter of responding judges report that more than ten times in the past three years they have presided over civil cases where a party needed an interpreter to participate effectively in the case. More than one third of bankruptcy judges report presiding frequently over cases where interpreting services were needed.

- **In criminal cases, however, where interpreters are routinely provided, 46 out of 172 responding judges (27%) report that in the past three years they have presided over a criminal case where an interpreter was needed but no qualified interpreter was available.**

While 14% of judges who responded to the question state that they would postpone proceedings until a qualified interpreter is available, others used bilingual speakers in the clerks' offices or the community to interpret. This practice could lead to inadequate interpreting by untrained persons who are unfamiliar with legal terminology. One attorney summarized the difficulties resulting from using non-qualified interpreters as follows:

> *"We need* far *better trained interpreters in languages other than Spanish. The people provided often do not understand their role, engage in private non-interpreter discussions with defendants, do not interpret everything said in court, do not understand the proceedings..."*

- **Most attorneys who report using Spanish language interpreters found that the quality of interpreting was generally adequate to very good during criminal trials or other trial-related sessions, and were generally pleased with the interpreters' knowledge of federal criminal procedure and terminology.**

This is less true with interpreters for languages other than Spanish, where lack of procedural knowledge can constitute a significant problem.

- **Most judges do not believe that the quality of interpreting has affected the conduct of cases over which they have presided, nor do judges appear to believe that the use of interpreters is viewed negatively by jurors and other case participants, although attorney discussion group participants suggested otherwise.**

By a wide margin, the judges reported that they had not observed this phenomenon. There appears to be some difference in perception between judges who are members of racial and ethnic minority groups and white judges, with slightly over 60% of white judges and slightly over 70% of minority group judges reporting that this had never happened in their experience. In this connection, it is noteworthy that disparaging conduct or comments based on a case participant's language or accent is reported on the attorney survey as frequently as bias based on race.

The Survey of Judges and the Survey of Attorneys provide the most direct observations of whether race, ethnicity or religion affect the business of the courts. The lawyers who practice in the federal courts are the most consistent observers of the courts' services. Moreover, lawyers are in the best position to observe bias by other lawyers when their behavior is not constrained by the presence of a judge. The surveys suggest that when judges are not present biased remarks on the part of other counsel and court staff tend to increase. This may provide an opportunity for the courts and the federal bar associations to assess ways to minimize such occurrences.

Criminal practitioners, and particularly lawyers in the federal defenders' offices, report a much higher level of incidents that they attribute to bias than do other lawyers. The source of this difference in perception merits careful further consideration.

Part IV

Criminal Justice Issues

The resolution creating the task force directed the members to study two important aspects of the criminal justice system—pretrial detention and sentencing—that are amenable to a statistical analysis of the possible effect of race or ethnicity on particular outcomes. A summary of these two studies appears below.

A. Ninth Circuit Pretrial Detention Study

Question. What relationship, if any, does the race or ethnicity of criminal defendants have to pretrial detention rates in the Ninth Circuit?

Methodology. Mr. Thomas Bak, a statistician with the Statistics Division of the Administrative Office of the United States Courts (AO) in Washington, D.C., was the principal consultant for this study. The "Ninth Circuit Pretrial Detention Study" was designed to determine the most important factors used by Ninth Circuit pretrial services officers in the decision to detain Pretrial Services Act (PSA)[9] defendants prior to trial. The study further sought to assess the magnitude of any relationship that may exist between defendants' race, ethnicity or gender and detention rates by determining whether these factors appeared to increase or decrease the chances of pretrial detention, assuming all other factors remained the same. The analysis is based on 1994 data from the Pretrial Database maintained by the Statistics Division of the AO for 9,813 defendants who had their pretrial services interview or first court appearance during the 1994 calendar year.[10]

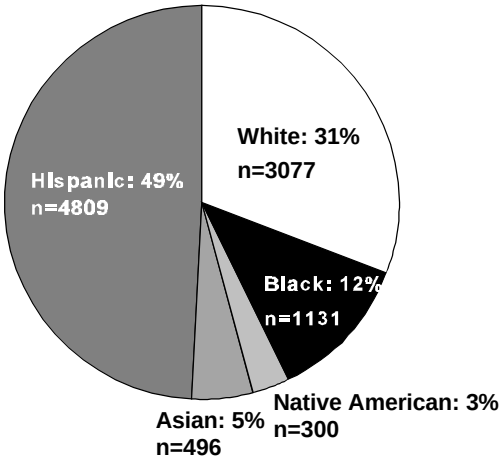
The racial/ethnic characteristics of the pretrial defendants included in the

[9] 18 U.S.C. § § 3152-3155 (1982).

[10] An additional 2,514 cases were not included in the analysis because they were missing crucial data on citizenship or race.

analysis is shown in chart 4.1 below:

4.1 Ninth Circuit PSA Defendant Population-1994



District detention decisions appear to be a function of: (1) the demographic characteristics of the defendant population such as citizenship and residency; (2) the types of offenses which the courts in the district encounter; and (3) the administrative policies and procedures of particular courts and pretrial services offices. The researcher's analysis used a two phased approach:

(1) Preliminary interviews and selection of key decision criteria. Interviews were conducted with the Chief Pretrial Services Officers or Chief Probation Officers in each Ninth Circuit district (except Guam and the Northern Mariana Islands[11]) to determine the key criteria used by individual offices in making the pretrial detention recommendation as well as any local policies or procedures which might affect this outcome.

[11]The researcher excluded these districts in his study because their populations are radically different than the other districts and the number of defendants processed is exceedingly small.

Based on those interviews and an extensive review of the literature, the consultant developed seven variables that were present in the pretrial database for subsequent statistical analysis. These variables were:

- **Citizenship** which indicates whether the defendant is an illegal immigrant, legal immigrant, or United States citizen. Illegal immigrant status may be related to flight risk and lack of community ties.
- **Residence** was intended to serve as a surrogate for "community ties." The Bail Reform Act includes community ties and length of residence in the community as factors bearing on pretrial release. *See* 18 U.S.C. § 3142(g)(3)(A).
- **Criminal history** was identified in interviews and the literature as having a strong positive correlation with the decision to detain and is also a factor specified in the Bail Reform Act. *See* 18 U.S.C. § 3142(g)(3)(A).
- **Severity of offense** is noted in interviews and the literature as being important in the detention decision. The Bail Reform Act includes "the nature and circumstances of the offense charged" as a factor that shall be considered. *See* 18 U.S.C. § 3142(g)(1).
- "**Rebuttable presumption."** For some types of serious offenses involving drugs or violence, the Bail Reform Act provides for a "presumption of detention" in contrast to the usual "presumption of release." *See* 18 U.S.C. § 3142(e). The presumption of detention must then be rebutted with appropriate evidence to support a release decision. This indicator was not chosen initially, but proved to have significant explanatory power when introduced in a trial run in a single district.
- **Race or ethnicity of the defendant and gender of the defendant** were treated as independent variables to determine whether they appear to be significantly related to the decision to detain.

(2) Statistical analysis of pretrial database data. Data was analyzed first at the circuit-wide level and then at the individual district level. Logistic regression analysis[12] was used to examine the effect of the independent variables on the

[12] This method, called a logit model, permits the researcher to isolate the effect of any one variable from a set of independent variables. For example, it allows the analyst to look at the importance of the defendant's race or ethnicity

decision to detain. Crosstabulations[13] served as a readily understandable check on the logistic regression analysis.

Caveats. There are a number of limitations in the data or in the methodology that affect the interpretations that can be drawn from this analysis:

- **Missing data.** Some 2,514 cases were excluded from the analysis because of missing data, transfers and dismissals. Of these, half were dropped for lack of a value for **citizenship.** Almost half the defendant population was missing information relative to determining the strength of **"community ties"** (e.g. data on employment, education, residence, and marital status). The lack of this information[14] meant that an aggregate "community ties" variable could not be employed. If such a variable had been usable, it may have demonstrated a stronger association between community ties and propensity to release than the "residence" variable which was used as a proxy. The **strength of the evidence against the defendant** is another factor which most of the literature cites as affecting the detention decision although in the Ninth Circuit the case law dictates that this variable be given the least weight. The Pretrial Database does not record this information, thus precluding examination of its effect.
- **Inherent limitations of crosstabulations** occur when certain categories in statistical tables contain only a few individuals, so that a switch of two or three individuals into another category could result in a large percentage change but perhaps not a meaningful difference.
- **Aggregating individual district data and reporting it on a circuit-wide basis can be misleading** by possibly masking significant differences among districts. For instance, in those districts that have large criminal dockets

to the detention decision compared with the importance of citizenship or the severity of the offense.

[13] Crosstabulations provide a simple description of presumed relationships between variables. For example, the researcher might use crosstabulations to describe the proportions of minority and white defendants that were detained or released in a given district.

[14] Information may not be recorded for a number of reasons. For example, the defendant may refuse to talk with a pretrial services officer on the advice of counsel or the defendant's other characteristics may be such that detention is mandated without regard to any additional information.

composed of immigration cases, detention rates may be higher for a large volume of defendants. Moreover, the majority of defendants are processed in just three districts—the Central and Southern Districts of California and the District of Arizona—thus potentially overshadowing data from other districts. For reasons unique to the practices and defendant population of the Southern District of California, data from that district must be interpreted with care.

- **The severity of offense variable** in the study was actually an index of maximum possible sentence length rather than the specific penalty associated with a specific charge. The lack of specificity in this variable somewhat reduced its power to explain any particular detention decision.

Highlights. Among the significant findings pointed out by the study are the following:

The effect of race or ethnicity

- A model with race as the sole independent variable and limited to United States citizens ran successfully in all districts and indicated that, **at the district level race or ethnicity was not significant in the decision to detain.**

- When aggregated data for the circuit as a whole are examined, race or ethnicity had less explanatory power than other variables such as offense severity in all logit models presented. In the model using seven independent variables for the entire circuit, the coefficients for African American and Hispanic defendant characteristics were negative (indicating a slightly greater likelihood of being detained), and they were significant at the 95% confidence level, but the magnitudes of the coefficients were small. The analysis indicates that, while a greater percentage of African American defendants are detained when compared to white defendants, the disparity is largely attributable to factors such as greater rates of alleged commission of rebuttable presumption offenses. Using similar controls at the circuit level reduced, but did not eliminate, the difference in detention rates between Hispanic and white defendants. This residual relationship is largely explained by unique administrative and population characteristics in the

Southern District of California.

Local variations in pretrial policies, procedures and philosophies

- The most striking finding of this study is the **diversity of Pretrial Services Office environments**, which affects the relative importance placed on various decision factors related to pretrial detention. This study is consistent with work done by others which has found substantial local variation in the implementation of federal authority.

- In addition to procedural differences, the Pretrial Services Offices in the districts of the Ninth Circuit also diverge in how they **interpret their roles.** Some have a law enforcement orientation that could potentially result in higher detention rates. Others emphasize a duty to maximize the number of defendants released. Despite these philosophic differences, detention rates tend to reflect the defendant environment and administrative practices of the office.

Most important legal and demographic factors

- In various multivariate regression models that use demographic factors, **the most critical variables in the detention decision are citizenship, criminal history, alleged commission of a crime for which there is a rebuttable presumption, severity of the alleged offense, and residential status.** Illegal immigrant status, alleged commission of a serious crime, and prior criminal conduct, all increase the likelihood that the defendant will be detained. Stronger community ties, as measured by residential status, increase the chances of release.

The effect of citizenship

- **Citizenship is associated with race and ethnicity in the Ninth Circuit, and citizenship appears to most strongly affect the detention decision in this analysis.**

- The study further found that the size of the **illegal immigrant population in the district strongly influences the overall detention rate in any given district.** The vast majority (96%) of illegal aliens entering the

pretrial system are Hispanic. Illegal aliens are almost always detained because of the risk of flight and the frequent inability of pretrial services officers to acquire information about community ties (which positively influence a decision to release). This fact artificially inflates the importance of race in explaining the circuit's detention rates. The circuit detention rate is 65% for all Hispanic defendants compared with 32% for all white defendants. This difference declines when the analysis controls for citizenship, becoming 41% for Hispanic defendants with United States citizenship compared with 31% for white defendants with United States citizenship.

- The two groups that experienced the **lowest rates of detention** in the Ninth Circuit were Asian (26%) and Native American (27%) defendants.

Severity of offense

- **The nature of the alleged offense plays an important role in the detention decision.** The mix of offenses varies considerably across the circuit. Different crimes embody different levels of severity. These crimes may or may not involve a rebuttable presumption with regard to detention, and they may have been committed by perpetrators with significantly different criminal histories. These factors, in turn, influence the decision to release or detain.

The effect of gender

- **At the circuit level, only 14% of the circuit's PSA defendants were women and their overall detention rate was less than half that of the men (24% versus 53%).** The difference persists even when controlling for factors such as criminal history.

- **In every district, men were considerably more likely to be detained than were women,** even when factors such as severity of offense and criminal history were taken into account. However, because of the skewed distribution (most defendants are male), gender has little explanatory power in any of the models. Women of all races were detained less frequently than were their male counterparts. Female detention rates did not exhibit as

much disparity across racial and ethnic groupings as did male detention rates.

B. Ninth Circuit Sentencing Study

Question. What effect, if any, does the race or ethnicity of a criminal defendant in the Ninth Circuit have on the judicial sentencing determination under the Sentencing Guidelines?

Methodology. Dr. Susan Katzenelson and Mr. Kyle Conley of the United States Sentencing Commission in Washington, D.C. were the principal consultants for this study. The researchers used the United States Sentencing Commission data on the 14,876 Ninth Circuit guideline sentences imposed during the two-year period from October 1, 1993 through September 30, 1995. The researchers used a form of regression analysis—tobit analysis[15]—to evaluate the significance of a number of variables in the sentencing process, including race and gender. Almost all of the data was analyzed on a circuit-wide basis rather than by individual district.

Caveats. This is a study only about judicial decision making. Sentencing outcomes are influenced by other decision makers as well—prosecutors, defense attorneys, law enforcement agents, defendants, and jurors. For example, the decision to file charges, to enter into a plea bargain, to co-operate with law enforcement, to stipulate to a drug quantity, or to convict, all occur prior to the judge's sentencing deliberations. Any of these decisions could have varying application among racial or ethnic groups and lead to different sentencing outcomes among such groups. None of these decisions is studied here. Similarly, the substantive law of sentencing, such as the mandatory minimum sentences required in some criminal statutes and the different sentences required by the

[15] Tobit analysis is a multivariate technique that is used when the dependent variable has a restricted distribution. In the sentencing study, the dependent variable was sentence length and the lower limit was restricted at zero (probation). One part of tobit analysis takes this lower limit and calculates the probability of the dependent variable being zero (probation) or greater than zero (sentenced). A second part of the tobit analysis comes into play if the value of the dependent variable is greater than zero and accounts for the sentence length.

Sentencing Guidelines by type and quantity of illegal drug, also influence sentencing outcomes, potentially leading to different outcomes between different racial or ethnic groups. This is not a study of the effect of the substantive law of sentencing on racial and ethnic groups.

Highlights. The researchers reported two major findings:

- **Sentences varied considerably by defendant race from the circuit average of 40 months.** African American and American Indian/Alaskan Native[16] defendants had the highest sentences at 61 and 56 months, followed by much shorter sentences for white defendants–38 months, Hispanic defendants–36 months and Asian/Pacific Islander defendants–30 months. The differences among racial and ethnic groups were also apparent within specific offense categories.

- **With one exception, all sentencing disparities between racial groups is explained by legally relevant factors, most often associated with characteristics of the offense and the criminal history of the defendant. The race of the defendant is not a statistically significant variable in the sentence of the defendant.**

The sole exception appeared to be for Hispanic drug defendants who tended to have higher sentences than white drug defendants. The researchers suggest that part of the correlation may be explained by the relationship between citizenship status and Hispanic origin and certain charging practices for crimes at the border.

Circuit Profile

- The fifteen district courts comprising the Ninth Circuit account for approximately one-fifth of all cases sentenced in the 94 districts and twelve

[16] Generally, the prosecution of American Indian defendants in federal court is brought under 18 U.S.C. § 1153, an exclusive federal mandate. Many of the enumerated crimes of Section 1153, as well as those enumerated in 18 U.S.C. § 2241, et seq., are crimes of violence or aggravated felonies within the federal Sentencing Guidelines and carry a higher sentencing range.

circuits of the United States.

- The three districts with the largest number of sentenced defendants—Arizona, Central California and Southern California—accounted for more than half (56%) of all sentenced cases.

- The relative frequency of offense types varied by district: for example, of that district's docket, violent crimes were most prevalent in Montana (15% of caseload); robberies in Central California (15%); drug trafficking in Arizona (44%); fraud in Nevada (22%); and immigration violations in Eastern California (30%).

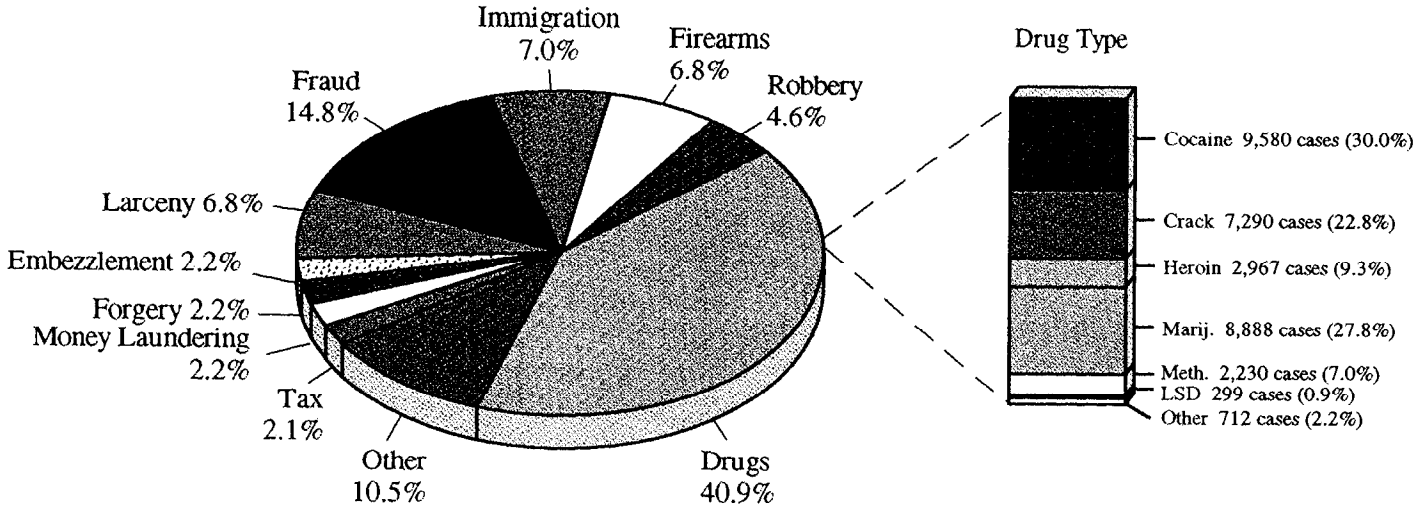
- The Ninth Circuit differed from the rest of the nation in the offense composition of its caseload: it had a smaller proportion of drug cases (36% compared to 41% of all cases nationwide), with a higher concentration of marijuana and methamphetamine trafficking and a lower incidence of powder and crack cocaine trafficking. The percentage of fraud and firearm offenses was also lower in the Ninth Circuit, balanced by a higher share of immigration offenses (18% compared to 7% nationally) and robberies (7% compared to 5% nationally). (See chart 4.2 on the next page.)

- The Ninth Circuit also varied from other circuits in the racial/ethnic distribution of defendants. Most notably, as compared to the other federal circuits, the Ninth Circuit has a larger proportion of Hispanic, American Indian/Alaskan Native and Asian/Pacific Islander defendants, and a smaller proportion of African American and white defendants. The relative proportion of each of these groups varied by district, with the highest rate of white defendants in Montana (58%), African American defendants in Northern California (26%), American Indian/Alaskan Native defendants in Montana (24%), Asian/Pacific Islander defendants in Guam (80%), and Hispanic defendants in Southern California (67%). (See chart 4.3 on page 58.)

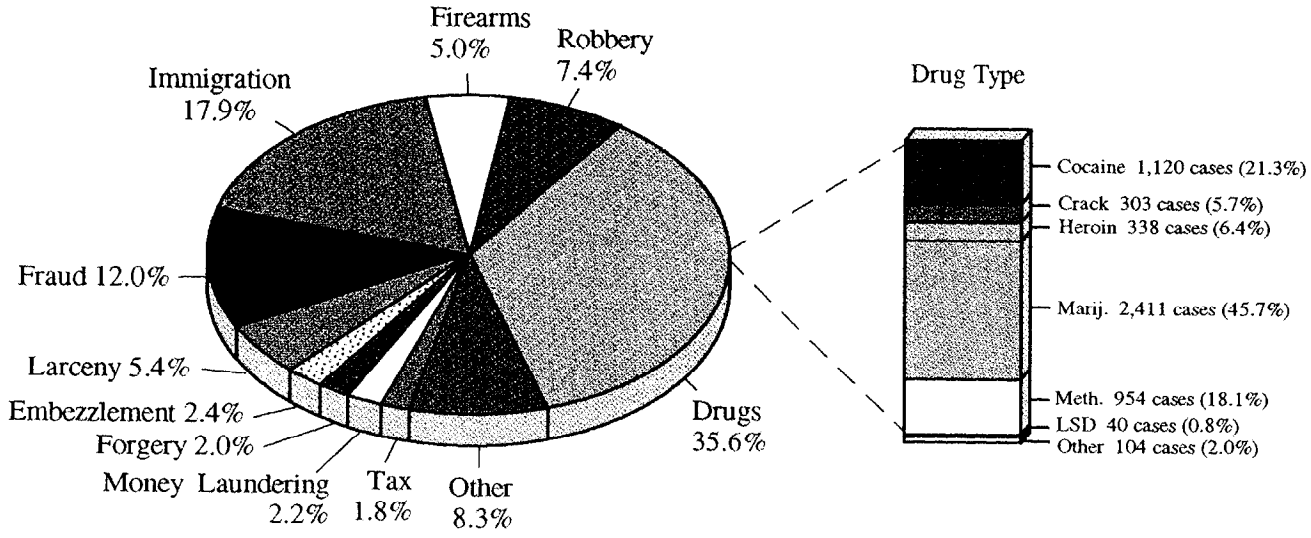
Chart 4.2

GUIDELINE DEFENDANTS SENTENCED BY PRIMARY OFFENSE CATEGORY [1]
(October 1, 1993, through September 30, 1995)

National



Ninth Circuit



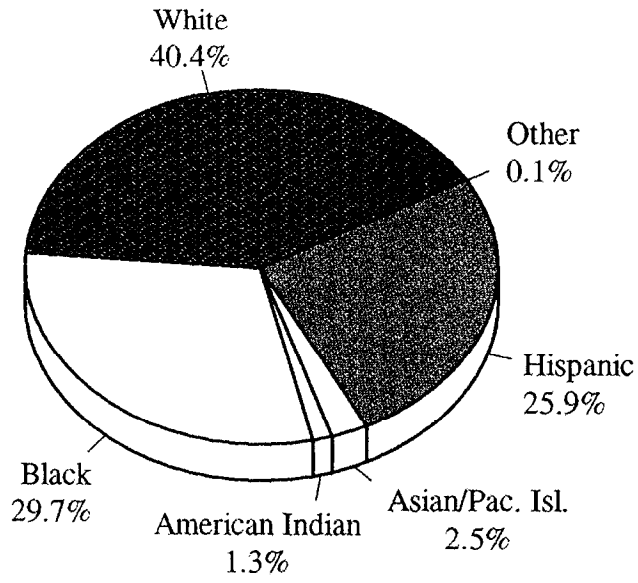
[1] Of the 78,471 national guidelines cases, 175 cases with missing primary offense category were excluded. Of the 31,988 drug cases (including trafficking, use of a communication facility, and simple possession), 22 cases with missing drug type were excluded from the bar chart. Of the 14,876 cases in the Ninth Circuit, 34 cases with missing primary offense category were excluded. Of the 5,277 drug cases, 7 with missing drug type were excluded from the bar chart.

SOURCE: U.S. Sentencing Commission, 1994 and 1995 Datafiles, MONFY94 and MONFY95.

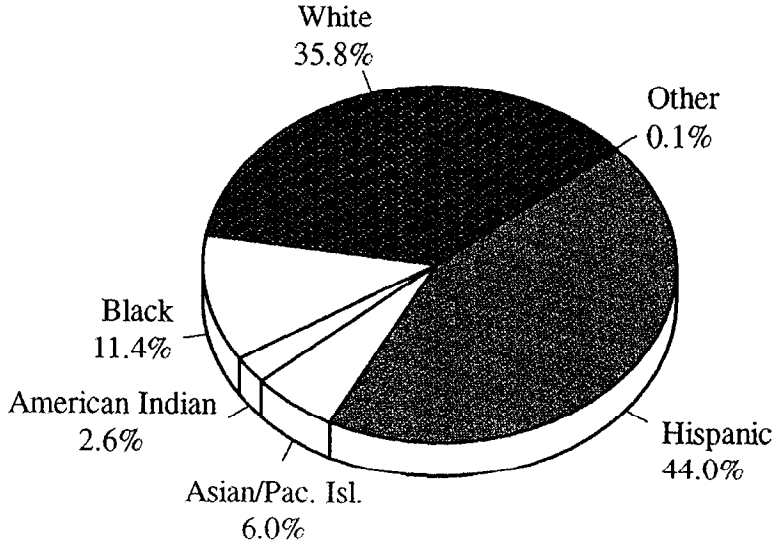
Chart 4.3

GUIDELINE DEFENDANTS SENTENCED BY DEFENDANT RACE [1]
(October 1, 1993, through September 30, 1995)

National



Ninth Circuit



[1] Of the 78,471 national guideline cases, 565 cases with missing race were excluded. Of the 14,876 cases from the Ninth Circuit, 59 cases with missing race were excluded.

SOURCES: U.S. Sentencing Commission, 1994 and 1995 Datafiles, MONFY94 and MONFY95.

- **While the overall circuit departure rate was 31.5 percent, there were variations in the rate and type of departures by racial groups.** Departures pursuant to a substantial assistance motion by the government were granted most frequently—approximately 20 percent of the time—to white defendants. White defendants as a group also had the highest upward departures rate at 4 percent. Other downward departures were most often given to American Indian/Alaskan Native defendants, at the rate of 23 percent. [17]

- Defendants who were Asian/Pacific Islanders (77%) and African Americans (75%) were the most likely to receive a sentence within the applicable guideline range.

Less Serious Offense Category

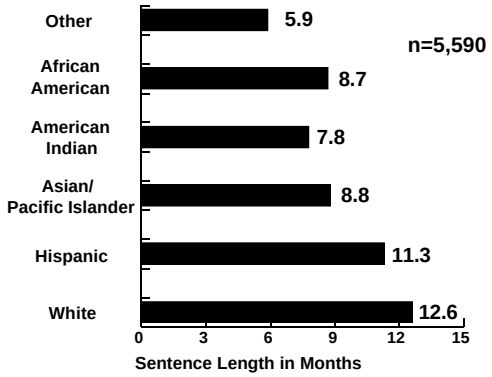
- To show the effect of holding sentencing factors constant, the researchers created a category of "less serious" offenses.[18] The overall circuit mean sentence for all offenses is 40 months, with African American and American Indian/Alaskan Native defendants receiving the highest sentences at 61 and 56 months and white (38 months), Hispanic (36 months) and Asian/Pacific Islander (30 months) defendants receiving the lowest sentences. For the "less serious" offenses category, the circuit average sentence is 11 months and white defendants receive the longest sentences. In the "less serious" category, sentence averages for all defendants who are members of racial and ethnic minority groups were equal to or lower than the overall circuit mean of 11 months; only white defendants received a

[17] The researchers considered that substantial assistance departures were similar to objective facts such as quantity of drugs. A substantial assistance departure can only be made after a motion by the government for such a departure. Other downward and upward departures were not included in the model design as independent variables. If race had any effect on the incidence or extent of these departures, such effect would have been measured as part of the race variable.

[18] The researchers defined the group of "less serious" cases as cases in which the defendant was not a career offender, had no more than a negligible criminal history, and where the case did not involve a violent crime, gun possession or use. "Less serious" drug cases did not have an applicable mandatory minimum sentence or there was no charge of trafficking in crack cocaine.

higher average sentence of almost 13 months. As aggravating factors are added, the mean sentences by race of the defendant change. (See chart 4.4 below.)

4.4 The Average Sentence for "Less Serious Cases" W Higher for White Defendants Than For Defendants Other Racial/Ethnic Groups in 1994 and 1995



Multivariate Analysis Results

The researchers performed regression analysis of sentencing data by five offense types most representative of the circuit criminal docket—violent crimes, robbery, immigration, fraud, and drugs. With one possible exception noted below, the researchers found no significant differences in sentencing by race in their analysis.

Violent crimes

- The race of the defendant is not a statistically significant variable in explaining sentence length.

- Of the legally relevant factors, an armed career criminal or career offender, a trial conviction, a conviction under 18 U.S.C. § 924(c), and multiple counts were all factors that contributed to increased sentence length, as would be expected; substantial assistance departure significantly reduced sentence length.

- However, **gender was statistically significant** at the .05 level. The importance of this finding is diminished by the very small number of violent female defendants and the fact that without one unusually long sentence imposed on a female defendant, gender would not be statistically significant.

Robbery

- The race of the defendant is not a statistically significant variable.

- Of the legally relevant factors, the presence of either the "bodily injury" or "weapon" enhancements (accounting for offense seriousness) significantly increased sentence length, while acceptance of responsibility and substantial assistance departure significantly reduced sentence length.

- However, being in **the "less than 21" age group was highly significant.** Sentences in this group were significantly lower than those of the control group of 31-35 year-olds, possibly due to lesser criminal histories among younger offenders.

Immigration violations

- The race of the defendant is not a statistically significant variable.

- Of the legally relevant factors, cases that went to trial, those with criminal history category II or greater, or those with an aggravating role enhancement were likely to get a longer sentence, while acceptance of responsibility reduction and mitigating role reduction had a significant negative association with the length of the sentence.

- However, **both the number of dependents and the defendant's age were highly significant.** Defendants with dependents were likely to get a shorter sentence than those with no dependents. Sentences were likely to increase as age increased. Defendants in the "less than 21" and "21-25" age groups were likely to receive a shorter sentence, and those in the 36-40 and 41-50 age categories, a longer sentence than defendants in the control group of 31-35 year-olds.

Fraud

- The race of the defendant is not a statistically significant variable.

- Of the legally relevant factors, criminal history had a significant positive relationship with sentence length, as did offense seriousness, while cases with acceptance of responsibility, mitigating role adjustment, or a substantial assistance departure could expect to receive shorter sentences.

- However, **gender and citizenship status are significant.** Defendants who were female or who were United States citizens receive lower sentences.

Drug offenses

- With the exception of Hispanic drug defendants, race is not a significant variable. Hispanic drug defendants tended to have longer sentences than white drug defendants (the control group). This was the only highly significant finding in race in any of the models (significant at the .01 level). It is likely to be the result of the cumulative effect of a number of smaller effects such as the correlation between Hispanic and non-United States citizenship. Another reason may be the practice of the Southern District of California (ended in 1995) of prosecuting large drug amounts as simple possession for those defendants caught crossing the border.

- Of the legally relevant factors, career offenders, defendants who went to trial, and multiple-count offenders received significantly longer sentences, as did those defendants convicted under 18 U.S.C. § 924(c), a drug mandatory minimum statute, and those in criminal history categories II-VI.

- Defendants in heroin cases received shorter sentences than in marijuana cases (the control group), while those convicted of violations involving methamphetamine received longer sentences. Cocaine also showed some significant positive relationship with sentence length.

- **There was a statistically significant relationship between the district in which the sentencing took place and the sentence itself.** Defendants in Central California and Eastern California received longer sentences than

those in the control district, Southern California, as did those in Hawaii, Montana, and Oregon. Defendants in Arizona received significantly shorter sentences, on average, than those in the control district.

- **Female defendants received significantly shorter sentences than their male counterparts, as did United States citizens** (at a lower significance level).

Part V

Conclusion

The Ninth Circuit Task Force on Racial, Religious & Ethnic Fairness has engaged in a series of studies over the past three years which have established the following principal findings in response to the questions it initially posed:

- In the area of employee demographics, the research has demonstrated that the racial and ethnic distributions of district employees reflect the diversity in district resident labor forces. In more than half the districts, minority racial and ethnic groups are often found in higher proportions in grade levels 6 through 10 than they are found in the resident labor forces.

- The numerous findings from the most comprehensive survey of Ninth Circuit court employees ever conducted confirm that, in general, employees of all racial, religious, and ethnic backgrounds perceive that they are treated equally in most of the basic personnel areas, including professional development, leave, and job changes. However, employees from minority racial and ethnic groups and women report higher levels of negative treatment in the workplace and higher levels of dissatisfaction with personnel evaluations and the grievance process.

- Concerning the litigation process, the vast majority of attorneys, particularly in civil practice, do not perceive the federal courts as "unfair to litigation participants." Similarly, relatively few judges reported observing bias during court proceedings or in chambers. However, criminal defense attorneys more often reported that defendants, witnesses or jurors are the subject of disparaging remarks, most often by other counsel, because of their English-language ability or accent, their presumed citizenship or immigration status, or their race or ethnicity. Just over one-quarter of the judges reported that the unavailability of qualified interpreters in cases where they were required by law was a problem.
- In the area of pretrial detention, the study concluded that the statistical

effect of race or ethnicity on the pretrial detention decision was slight when the data are analyzed at the Circuit level, and mostly nonexistent when the data are analyzed district by district. The factors with the most effect upon the decision to detain were citizenship and criminal history of the defendant. Divergent policies and practices of the Pretrial Services Offices also have an effect on the outcome of the detention decision.

- In the area of Guideline Sentencing decisions, the study concluded that, while there are obvious sentence differences among racial/ethnic groups, these differences are explained by a set of legally relevant factors most often associated with characteristics of the offense and the criminal history of the defendant. Higher sentences for Hispanic drug defendants appear to be a partial exception in part because of the link between citizenship and race.

- Religion was rarely cited as a subject of bias, either by the employees or in the Survey of Judges or Survey of Attorneys. However, those few who cited disparate treatment because of religion appear to feel strongly about it.

Overall, based upon the extensive scholarly studies by the consultants to the task force, the courts of the Ninth Circuit appear to be relatively free from many of the negative effects of race, religion, or ethnicity on their work product and in the workplace. Of course, there is room for improvement and further study. This is particularly true in the employee personnel area, in the criminal practice, and in the provision of interpreter services, among others.

The circuit aspires to be a "model of unity." It created the task force to help it achieve this goal. The task force respectfully submits this report and its recommendations with the hope that the work of the task force will assist the circuit to move closer to that goal.

Part VI

Appendix

1993 Resolution No. 1

Establish a Task Force on the Effects of Ethnicity, Race, and Religion on the Administration of Justice in the Ninth Circuit

Submitted by

The Honorable Arthur L. Alarcon, Circuit Judge
The Honorable Robert Boochever, Circuit Judge
The Honorable Dorothy W. Nelson, Circuit Judge
The Honorable John C. Coughenour, W.D. Wash.
The Honorable Irma E. Gonzalez, S.D. Cal.
The Honorable Terry J. Hatter, Jr., C.D. Cal.
The Honorable Marilyn L. Huff, S.D. Cal.
The Honorable Consuelo B. Marshall, C.D. Cal.
The Honorable A. Wallace Tashima, C.D. Cal.
The Honorable Lynne Riddle, Bankruptcy Judge, C.D. Cal.
Bill Lann Lee, Esquire, Lawyer Representative
The Ninth Circuit Lawyer Representatives Coordinating Committee

WHEREAS, the federal courts in the Ninth Circuit have a paramount commitment to assuring fairness and equity in the administration of justice; and

WHEREAS, the population in the Ninth Circuit is the most ethnically and racially diverse of all the circuits in the nation; and

WHEREAS, manifestations of ethnic, racial, and religious bias may exist in the federal court system despite efforts by the bench and bar to eradicate them; and

WHEREAS, at least 15 state court systems and one federal circuit have established commissions or task forces to examine the effects of racial and ethnic bias in the courts; and
WHEREAS, the Judicial Conference of the United States has encouraged the federal courts to sponsor educational programs for judges, supporting personnel, and attorneys to sensitize them to concerns of bias based upon race and ethnicity; and

WHEREAS, the Ninth Circuit has learned much about how to approach successfully fairness and equity issues through its Gender Bias Task Force and the work of the state court bias commissions;

NOW, THEREFORE, BE IT RESOLVED THAT:

I) The members of the Judicial Conference of the Ninth Circuit commit their full cooperation and support for a study of the effects of ethnicity, race, and religion on the business of the courts and for implementation of appropriate recommendations flowing therefrom; and,

II) The Judicial Council of the Ninth Circuit:

A) Establish a task force composed of judges, lawyers, court administrators, social scientists, and lay representatives of diverse backgrounds and experiences to conduct a study of the effects of ethnicity, race, and religion on the business of the courts in the Ninth Circuit;

B) Charge the task force to explore and examine the effects of ethnicity, race, and religion on the business of the courts of the Ninth Circuit, including but not limited to:

1) how men and women of minority ethnicities, races, or religions are affected; and,

2) the effects on litigants and other participants in the criminal justice system, with attention paid to charging, pretrial detention and release, trial, prosecution, and sentencing determinations; and,

3) the effects of language barriers on access to and participation in the courts; and,

4) the effects on Ninth Circuit courts as workplaces and as employers; and,

5) the effects on litigants and participants in alternative dispute resolution processes; and,

6) identifying existing successful efforts and examples of ethnic, racial, and religious cooperation and harmony in the circuit for others to emulate; and

7) the perceptions of the Ninth Circuit in the larger community and how to ensure faith in the justice system.

C) Reaffirm, by resolution, its commitment to fairness and equity in all aspects of the administration of justice in the Ninth Circuit, and articulate and implement specific policies in furtherance thereof;

D) Authorize the task force to participate in national efforts and work in cooperation with other jurisdictions to study and recommend methods to redress any problems identified; and

E) Direct the task force to report its findings, conclusions, and recommendations to the judicial conference of the circuit and to provide interim reports as requested.

Statement of Reasons

The Ninth Circuit has been a leader among the federal courts in undertaking a careful study of the issue of gender as it affects the business of the courts. The administration of justice in Ninth Circuit courts has already benefitted immeasurably from the serious consideration of this report and will benefit further from the implementation of the recommendations to assure gender equity and fairness.

Looking to the future, the Ninth Circuit is in a unique position to draw upon its experience and background from the gender bias study to explore interrelated issues of ethnicity, race, and religion as they affect the business of Ninth Circuit courts. Further, the Ninth Circuit has an obligation, pursuant to a September 1992 resolution of the Judicial Conference of the United States, "to sponsor educational programs for judges, supporting personnel and attorneys to sensitize them to concerns of bias based on race, ethnicity, gender, age and disability...."

At a day-long conference convened in Pasadena in January 1993, over 50 individuals representing the courts, bar associations, civil justice organizations, law schools, U.S. Attorney's offices, legal defenders, and social scientists met to discuss the appropriate role for the Ninth Circuit in this area. A consensus emerged that these issues warrant careful consideration by the court and that a special task force should be established. Four areas of particular concern emerged: the criminal justice system, the specific experiences of women of minority ethnicities, races, or religions, the effects of language barriers on court processes, and the importance of outreach to the community. See *Report of the Conference on Ethnicity, Race, and Religion and the Ninth Circuit*, January 27, 1993. Copies are available from the Office of the Circuit Executive, P.O. Box 193846, San Francisco, CA 94119-3846.

The conference urged a wide-ranging research agenda, including statistical reporting, the effects of language and the use of interpreters, prosecutorial and sentencing disparities, and interactions with the public and with tribal courts, among others. The conference further recommended that the circuit should begin immediately to implement policies to further fairness, including assuring diversity in court appointments of bankruptcy and magistrate judges, prohibiting memberships in clubs that invidiously discriminate, requiring appropriate accommodations when calendaring matters at times of religious holidays, and sponsoring and encouraging educational programs with components on ethnicity, race, and religious fairness and cultural awareness.

Passage of this resolution will begin the process of formally addressing a spectrum of important issues that have a daily impact on the effective administration of justice in the Ninth Circuit, and will demonstrate once again the Ninth Circuit's leadership in improvements to the operations of the courts.

1996 Resolution No. 1

Complete the Research and Prepare the Final Report of the Ninth Circuit Task Force on Racial, Religious and Ethnic Fairness

Submitted by

The Ninth Circuit Task Force on Racial, Religious and Ethnic Fairness
and
The Lawyer Representatives Coordinating Committee

NOW, THEREFORE, BE IT RESOLVED THAT the Judicial Conference of the Ninth Circuit continue its work to assure fairness and equity in the administration of justice by:

(1) Authorizing the Task Force on Racial, Religious and Ethnic Fairness in the Courts to complete its research and to submit a final report following the receipt of suggestions and commentary from the conference of August 1996, and to provide information to the districts regarding its research, findings, and recommendations;

(2) Encouraging each district to review the final report and recommendations and to consider whether there are areas included within the study that require further analysis on a district level. Each district is requested to determine whether educational programs for the court, its staff, and the local bar may be desirable and whether changes to court procedures should be made to accommodate different racial, religious, and ethnic groups within the district. After consideration of the study, each district is urged to report to the task force what steps may be taken in the district to implement the recommendations;

(3) Directing the Task Force on Racial, Religious, and Ethnic Fairness to report back to the Ninth Circuit Judicial Conference on responses to the final report and implementation efforts planned or underway in each district and to suggest areas for further study and implementation;

(4) Urging the bench, bar, and staff of the Ninth Circuit to continue to promote fairness in federal court processes and procedures and to reaffirm the commitment to equal justice.

Statement of Reasons

In 1993 the Ninth Circuit Judicial Conference established a task force of judges, lawyers, court administrators, and social scientists to study the effects of race, religion, and ethnicity on the business of the federal courts of the Ninth Circuit. The judicial conference set forth an ambitious research outline for the project. Despite the suspension of work from October 1995 to March 1996 due to budgetary uncertainty, the task force has managed to complete a major portion of its research and prepare preliminary findings. Still ahead is the completion of the final report, discussion, formulation of recommendations, and implementation.

Passage of this resolution will affirm the importance of completing this study, disseminating information to the districts, and constructively building upon the findings and recommendations. Passage will once again demonstrate the Ninth Circuit's leadership in addressing issues that have a daily impact on the administration of justice and in exploring ways to improve the operation of the courts.

1997 Resolution No. 8

Assure Fairness in the Courts: Fully Implement the Recommendations of the Ninth Circuit Task Force on Racial, Religious & Ethnic Fairness

Submitted by

The Ninth Circuit Lawyer Representatives Coordinating Committee

WHEREAS, the federal courts in the Ninth Circuit have a paramount interest in and commitment to the fair and unbiased administration of justice in the circuit, including specifically the prevention of all forms of bias in our court system, and specifically forms of bias based upon race, religion, and ethnicity; and

WHEREAS, the Ninth Circuit Task Force on Racial, Religious & Ethnic Fairness has submitted its findings and final report which include recommendations to assist the bench and bar in preventing all forms of bias based upon race, religion, and ethnicity;

NOW, THEREFORE, BE IT RESOLVED THAT the Ninth Circuit Judicial Conference hereby:

(1) Endorses the findings of the Ninth Circuit Task Force on Racial, Religious & Ethnic Fairness; and

(2) Urges the bench and bar of the Ninth Circuit to assist in implementing the recommendations of the Ninth Circuit Task Force on Racial, Religious & Ethnic Fairness; and

(3) Urges the bench and bar of the Ninth Circuit to continue to provide a leadership role in preventing all forms of bias in the courts and in reaffirming the circuit's fundamental commitment to equal justice.

Statement of Reasons

Reasons For

Ninth Circuit courts have been engaged in self-study efforts to assure the fair administration of justice since 1990 when its Gender Bias Task Force was formed. That task force issued its pioneering final report, *The Effects of Gender in the Federal Courts*, in 1993. At the Ninth Circuit Judicial Conference that same year, the judges and lawyers at the conference overwhelmingly passed a resolution endorsing the task force's report and urging the implementation of its recommendations.

The same circuit conference approved a resolution to create a task force to study the effects of race, religion, and ethnicity on the business of the courts. That task force included representatives from across the circuit and from all court units. The task force has worked for more than three years to prepare its final report and recommendations that are being circulated at the 1997 Ninth Circuit Judicial Conference.

This resolution seeks to obtain the same endorsement and support for the final report and recommendations of the Ninth Circuit Task Force on Racial, Religious & Ethnic Fairness as that obtained by the Ninth Circuit Gender Bias Task Force. By doing so, the circuit will continue its leadership role throughout the country in the area of elimination of bias in the courts. The Lawyer Representatives Coordinating Committee is pleased to support the work of the task force, and urges that, by this resolution, the Ninth Circuit reaffirm its commitment to preventing all forms of bias and to ensuring that courts are places in which all can be fully and fairly heard.

Reasons Against

Although the task force has presented preliminary oral reports at two previous circuit conferences, the members of the conference may not have had sufficient time to read and discuss the final findings and recommendations of the task force, therefore it is premature to seek their not-fully-informed endorsement of its work.

It is not for the circuit judicial conference to adopt the task force's work, but rather it is up to each individual district and court unit to study the report and to determine how best to respond to it in their district.

Task Force Working Groups

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Patricia J. Gray
Dr. Deborah Hensler
Hon. Stephen M. McNamee
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